Report on Administrative Law; Part II: Judicial Review of Administrative Action

Manitoba
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Commission

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COMMISSION DE RÉFORME DU DROIT

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ADMINISTRATIVE LAW; PART II:
JUDICIAL REVIEW OF ADMINISTRATIVE ACTION

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TABLE OF CONTENTS

Page #

TABLE OF ABBREVIATED REFERENCES vi

CHAPTER 1 - INTRODUCTION 1

- A. TERMS OF REFERENCE 1
- B. SCOPE OF REPORT 3
- C. GENERAL COMMENTS 5
- D. ACKNOWLEDGEMENTS 6
- E. STRUCTURE OF REPORT 6

CHAPTER 2 - THE PRESENT LAW 8

- A. THE GROUNDS OF JUDICIAL REVIEW 8
  - 1. Absence of Authority 9
  - 2. Declining to Exercise Authority 13
  - 3. Procedural Errors 14
  - 4. Excess of Authority/Abuse of Discretion 16
  - 5. No Evidence 17
  - 6. Fraud by a Party 18
  - 7. Error of Law on the Face of the Record 19
- B. THE REMEDIES 26
  - 1. Certiorari and Prohibition 27
    - (a) Introduction 27
    - (b) Scope 28
    - (c) Procedure 30
    - (d) *Locus standi* 32
    - (e) Discretion in granting certiorari and prohibition 33
  - 2. Mandamus 34
    - (a) Introduction 34
    - (b) Scope 35
    - (c) Procedure 35
    - (d) *Locus standi* 36
    - (e) Discretion in granting mandamus 37

Page #

3. Declaration 37

(a) Introduction 37
(b) Scope 38
(c) Procedure 40
(d) *Locus standi* 41
(e) Discretion in granting declarations 47

4. Injunction 48

(a) Introduction 48
(b) Scope 49
(c) Procedure 52
(d) *Locus standi* 52
(e) Discretion in granting injunctions 53

5. Quo Warranto 53

(a) Introduction 53
(b) Scope 54
(c) Procedure 55
(d) *Locus standi* 55
(e) Discretion in granting quo warranto 56

CHAPTER 3 - DEFICIENCIES OF THE PRESENT LAW 57

CHAPTER 4 - REFORM IN OTHER JURISDICTIONS 60

A. ASSIMILATION WITH CIVIL PROCEEDINGS 60

B. A SINGLE APPLICATION FOR THE JUDICIAL REVIEW REMEDIES . . 63

C. A NEW STATUTORY REMEDY 76

CHAPTER 5 - RECOMMENDATIONS FOR REFORM 84

A. GENERAL 84

B. THE SCOPE OF THE NEW APPLICATION FOR REVIEW 87

1. General 87

2. The Crown Prerogative 90

3. Criminal and 'Quasi-Criminal' Proceedings 92

Page #

4. Investigations, Recommendations and Other Non-final Decisions 95

5. Decisions Made By Internal Committees 97

6. Relationship to the *Federal Court Act* 98

C. STANDING TO INSTITUTE JUDICIAL REVIEW PROCEEDINGS 99

1. General Principles 99

2. Arguments Against Liberalization 104

(a) Opening the floodgates 105
(b) Separation of powers 106
(c) The proper plaintiff 107
(d) The role of the Attorney-General as protector of the public interest 109

3. Proposed Rules of Standing 112

D. THE GROUNDS OF REVIEW 116

1. Adequacy of the Common Law 116

2. Codification of the Grounds of Review 126

3. Privative Clauses 130

E. RELIEF AVAILABLE ON AN APPLICATION FOR REVIEW 134

1. General 134

2. Discretion to Refuse Relief 135

3. Interim Relief 137

4. Relief Against the Crown 139

5. Damages 144

F. PROCEDURE 148

1. The Court 148

2. Limitation Period 149

3. Institution of Proceedings 150

4. Filing of Record and Other Material 152

5. Conversion of Proceedings 154

Page #

G. PARTIES TO AN APPLICATION 157

1. Service and Naming of Parties 157

2. The Role of the Tribunal 158

H. THE ATTORNEY-GENERAL 168

1. *Locus standi* 168

2. Intervention 169

3. Notice 171

I. RELATIONSHIP BETWEEN APPEALS AND REVIEW 172

J. INCIDENTAL MATTERS 176

1. Extension of Time for Application 176

2. Court Not Limited by Content of Application 178

3. Technical Defects 178

4. Quo Warranto 179

5. *Habeas Corpus* 182

K. DOMESTIC TRIBUNALS 182

1. What Is a Domestic Tribunal? 183

2. Consensual Arbitrators 184

3. University Committees 188

4. Other Domestic Tribunals - Trade Unions, Business Associations and Clubs 190

L. MECHANICS OF REFORM 197

M. THE IMPACT OF THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS* 197

1. Scope 198

2. Grounds of Review 202

(a) Fundamental freedoms 203
(b) Fundamental justice 204

3. Remedies and Procedure 205

Page #

CHAPTER 6 - LIST OF RECOMMENDATIONS 208

CHAPTER 7 - THE JUDICIAL REVIEW ACT WITH COMMENTARY 214

APPENDIX A - THE JUDICIAL REVIEW ACT 234

APPENDIX B - COMMENTATORS ON DRAFT REPORT 243

TABLE OF ABBREVIATED REFERENCES

Alta	Alberta. Institute of Law Research and Reform, *Judicial Review of Administrative Action: Application for Judicial Review* (Report No. 40, 1984). References are to the rules as recommended in the Institute's Report.
Aust	Australia. *Administrative Decisions (Judicial Review) Act 1977*, No. 59 of 1977, as am. by *Administrative Decisions (Judicial Review) Amendment Act 1978*, No. 66 of 1978, as am. by *Administrative Decisions (Judicial Review) Amendment Act 1980*, No. 111 of 1980, as am. by *Defence Force (Miscellaneous Provisions) Act 1982*, No. 153 of 1982, as am. by *Ombudsman (Miscellaneous Amendments) Act 1983*, No. 62 of 1983. Minor amendments affecting only the schedules to the Act are not cited.
Barb	Barbados. *Administrative Justice Act, 1980*, c. 1980-63.
BC	British Columbia. *Judicial Review Procedure Act*, R.S.B.C. 1979, c. 209, as am. by *Court of Appeal Act*, S.B.C. 1982, c. 7, s. 64 (first enacted as S.B.C. 1976, c. 25).
Can	Canada. *Federal Court Act*, R.S.C. 1970 (2nd Supp.), c. 10.
Eng Act	England. *Supreme Court Act 1981*, c. 54, s. 31 (U.K.).
Eng Rules	England. Order 53 of the Rules of the Supreme Court as substituted in 1977 by the Rules of the Supreme Court (Amendment No. 3) 1977, (S.I. 1977 No. 1955), as am. by the Rules of the Supreme Court (Amendment No. 4) 1980, (S.I. 1980 No. 2000), as am. by the Rules of the Supreme Court (Amendment No. 2) 1982, (S.I. 1982 No. 1111).
LRCC	Canada. Law Reform Commission of Canada, *Judicial Review and the Federal Court* (Report No. 14, 1980).
NB	New Brunswick. *Rules of Court*, effective April 1, 1982.
NS	Nova Scotia. *Civil Procedure Rules*, effective March 1, 1972.
NZ	New Zealand. *Judicature Amendment Act 1972*, No. 130 of 1972, as am. by *Judicature Amendment Act 1977*, No. 32 of 1977.
Ont	Ontario. *Judicial Review Procedure Act*, R.S.O. 1980, c. 224, as am. by S.O. 1984, c. 11, s. 188 (first enacted as S.O. 1971, c. 48).
PQ	Québec. *Code of Civil Procedure*, L.R.Q. 1977, c. C-25.
Sask	Saskatchewan. *Queen's Bench Rules*, Part Fifty-Two, as revised in 1983.

CHAPTER 1

INTRODUCTION

A. TERMS OF REFERENCE

1.01 The Commission's administrative law project began with a reference from the then Attorney-General requesting that we inquire into the advisability of enacting an Administrative Procedures Act, a draft copy of which was enclosed for our review and comments. Following further consultation with the then Attorney-General, it was agreed that our mandate was no longer to be restricted to a review of the draft Act but, instead, was to extend to an inquiry and consideration of the procedures generally governing provincial administrative agencies. The scope of our inquiry was further broadened to include a study concerning the advisability of reform in the area of judicial review of administrative action. In particular, we were asked to give consideration to streamlining the various judicial remedies available as part of the administrative process while regularizing, to some extent, the basis upon which judicial remedies are made available.

1.02 Our Report on Administrative Law consists of two Parts. In Part I we reviewed the procedures of provincial administrative agencies and recommended changes where improvement was deemed necessary.[1] Our major recommendations in Part I were that provincial government agencies which principally make decisions directly affecting the rights or interests of a person or group of persons have published rules of practice and procedure to govern those decisions; that the model rules of procedure set forth in our Report form the basis for preparing such rules; and that a body be established in the executive branch of government, consisting chiefly of one person, to assist agencies in the drafting of separate rules of practice and procedure and to monitor compliance therewith. It was further recommended that it be the duty of this monitoring body to review the present rights of appeal from decisions of each provincial government agency and to determine the desirability of reform in this area on an agency-by-agency basis. In this, Part II of the Report, the reform of judicial review of administrative action is addressed.

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[1] The Manitoba Law Reform Commission, *Report on Administrative Law; Part I: Procedures of Provincial Government Agencies* (Report #58, 1984).

1.03 Our decision to deal first with the establishment of appropriate administrative procedures, and then with judicial review, reflects the Commission's view of the relative emphasis which should be placed on each as a method of protecting individual rights and promoting good administration. We are in agreement with the observations that "judicial review of bad administrative decisions is a poor substitute for good administrative decisions in the first place",[2] and that "[c]onstructive measures to enhance the original quality of decisions . . . will, in the aggregate, ensure greater justice for more people than could possibly benefit from any system of judicial review".[3] Nevertheless, the superior courts have historically played, and will continue to play, a vital role in protecting individuals from unauthorized administrative activity and in ensuring that public authorities exercise their powers according to law. The role of judicial review has been strengthened by the Supreme Court of Canada's recent affirmation that judicial review of decisions of provincial statutory authorities on questions of jurisdiction is constitutionally guaranteed.[4] As well, the entrenchment of the *Canadian Charter of Rights and Freedoms*[5] provides a fertile new basis upon which courts will be asked to rule on the legality of governmental activity.

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[2] W. Gellhorn, *Federal Administrative Proceedings* (1941) 43.

[3] H.W. Arthurs, "Rethinking Administrative Law: A Slightly Dicey Business" (1979), 17 Osgoode Hall L.J. 1 at 44.

[4] *Crevier* v. *The Attorney General of the Province of Quebec*, [1981] 2 S.C.R. 220.

[5] *Canadian Charter of Rights and Freedoms*, being Part I of the *Constitution Act, 1982*, being Schedule B to *Canada Act 1982*, c. 11 (U.K.).

B. SCOPE OF REPORT

1.04 In the following pages, we shall be examining the law respecting the judicial review of acts and decisions of "administrative authorities",[6] i.e., those persons and bodies whose activities form the subject matter of administrative law. It is easier to describe the class of such administrative authorities by way of example, rather than by attempting to devise an all-inclusive definition.

1.05 Included within the contemplation of this Report is the judicial review of the acts and decisions of

- the Crown, Ministers of the Crown and government department officials;
- provincial government agencies, which were studied in Part I of this Report;[7]
- municipal and other local government authorities;
- Crown corporations;
- school boards and universities;
- self-governing professional and occupational associations;
- provincial inferior courts.

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[6] Unless a particular context indicates otherwise, "administrative" is employed in this Report as a general term, and not in contradistinction to "judicial", "quasi-judicial", "legislative" or "ministerial". "Administrative authority", "public body", "agency" and "tribunal" are used generally and interchangeably in the following chapters.

[7] The term "provincial government agency" refers to any board, commission, association or other body of persons, whether incorporated or unincorporated, all of the members of which (or all of the members of the board of management or board of directors of which) are appointed by legislation or by order of the Lieutenant Governor in Council. The term also includes those boards whose members are not appointed by legislation or by order of the Lieutenant Governor in Council but, in the discharge of their duties, are public officers or servants of the Crown or are, directly or indirectly, responsible to the Crown. Well over 200 bodies fall within the ambit of this definition.

Generally, this list may be said to comprise organs of the executive arm of government and other persons or bodies administering or exercising authority under the laws of the province. Most, but not all, of their powers are derived from provincial legislation.

1.06 It is not sufficient, however, merely to refer to types of bodies in delimiting the scope of this Report; functional criteria, in addition to institutional criteria, must be introduced as a point of reference. Not all the activities undertaken by the above-mentioned authorities fall within the ambit of administrative law in the context of judicial review. It is only those functions which may be described as "public", as opposed to "private", which concern us at present, although admittedly no clear demarcation between these categories can be drawn.

1.07 Mention should also be made of a loosely-knit group of bodies generally referred to as "domestic tribunals". Included within this term are consensual arbitration boards, internal committees of universities and disciplinary committees or governing bodies of trade unions, business associations and sporting or social clubs. Insofar as these bodies make determinations affecting the rights, privileges or interests of persons over whom they exercise authority, they are akin to certain public administrative authorities. However, it is from contract or from the consent of the organizations' members, rather than from statute or other governmental source, that these tribunals derive their powers of decision. While the focus of our Report is on the judicial review of decisions of administrative authorities, for reasons discussed later in this Report our recommendations do touch upon the judicial control exercised over the decisions of domestic tribunals as well.

1.08 Our study involves both the procedural and substantive aspects of the law of judicial review, although, as will be seen, our recommendations for reform are predominantly of a procedural nature. One substantive issue which we do not address is that of the liability of administrative authorities in damages for loss resulting from administrative acts and decisions. This matter lies at the juncture of administrative law and the law of torts, and involves at present a somewhat awkward synthesis of the fundamental principles of these two areas of the law. Should proof of *ultra vires*, rather than tortious, activity constitute the foundation for an action for damages against an administrative authority? Should a cause of action in damages be established for exceptional loss suffered by an individual as a result of administrative activity, even in circumstances where the activity is not unlawful? A consideration of these difficult questions lies beyond the scope of this Report.

C. GENERAL COMMENTS

1.09 The superior courts at common law exercise an inherent supervisory jurisdiction over inferior tribunals and other public authorities. This role of the courts is a product both of history and of the constitutional principles upon which the Canadian federal democratic system is based.

1.10 The Commission accepts as a basic premise of this Report that some measure of judicial control over the actions of administrative authorities is desirable. The following factors have guided us in making our proposals for reform:

(a) Judicial review operates not only to protect individual rights and interests from unauthorized administrative interference but also more generally to ensure that public powers are exercised within their legal limits. This guideline influenced us particularly in formulating our recommendations respecting the rules of standing to institute review proceedings.

(b) The law relating to judicial review procedures and remedies should be designed to facilitate the determination of the case before the court on its merits and to empower the court to award the relief most appropriate in the circumstances. Technical distinctions respecting the scope of various remedies and the procedures for their obtainment can cloud the resolution of the substantive issues and add needless complexity to the law.

(c) The general approach of the courts in judicial review proceedings should be one of restraint. This is not to suggest that unauthorized activity, abuse of discretion or disregard for individual rights should go unchecked. Rather, it is to acknowledge the need for both sensitivity to the complex issues of policy and dictates of efficiency which often influence the administrative decision-making process, and respect for the expertise developed by many administrative tribunals in their assigned fields of endeavour. In particular, the Commission welcomes the deferential approach recently articulated by the Supreme Court of Canada in relation to the review of a specialized tribunal's interpretation of the provisions of its governing statute.[8]

D. ACKNOWLEDGEMENTS

1.11 The Commission wishes again to acknowledge the advice and assistance of David J. Mullan, Professor of Law, Queen's University, whose contribution to our study of judicial review was noted in Part I of this Report. We wish also to acknowledge M. Bernard Nepon, Professor of Law, University of Manitoba, and Ross A.L. Nugent, Q.C., a Winnipeg practitioner, for their contributions in the early stages of this project. As well, we should like to thank Mr. R.H. Tallin, former Deputy Minister and Legislative Counsel, Mr. Eugene Szach, Research Director of the Constitutional Law Branch, Department of the Attorney-General, and Professor Nepon for reviewing various drafts of the proposed Judicial Review Act which accompanies this Report and providing us with valuable suggestions. It should be stated, however, that in many respects our recommendations and proposed Act differ significantly from the suggestions put forward by the above-named persons.

1.12 In Appendix B of this Report, we identify those persons and organizations who provided us with comments in response to an earlier draft of this Report, which received limited circulation in January, 1986. We wish to thank them for giving freely and generously of their time. We have benefitted also from the work of law reform agencies which have previously issued papers and reports on judicial review of administrative action, and we shall be examining the various approaches to reform advocated by these agencies later in this Report.

E. STRUCTURE OF REPORT

1.13 The structure of Part II of this Report is as follows. In Chapter 2 we present the existing law relating to the judicial review of administrative action. In particular, we examine the grounds of review and the remedies which are at present available. Our aim is to provide a brief, general and somewhat simplified overview of the subject matter to serve as a background to our recommendations; it is not the purpose of this Report to present an extensive analysis of the applicable principles or to venture deeply into the voluminous and sometimes involuted case law which has developed in this area. The interested reader is referred to the many textbooks[9] and scholastic commentaries for a more detailed examination.

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[8] *See e.g.*, *Canadian Union of Public Employees Local 963* v. *New Brunswick Liquor Corporation*, [1979] 2 S.C.R. 227.

1.14 In Chapter 3, we summarize the deficiencies of the present law, focusing primarily on the technical distinctions and complexities which accompany the existing remedies in judicial review proceedings. Various general options for reform are considered in Chapter 4. In the fifth Chapter, we present our own proposals for reform; a list of our recommendations follows in Chapter 6. Our Report concludes with the Commission's proposed Judicial Review Act in which our recommendations are reduced to statutory form. The Act is set forth in Chapter 7 along with a commentary by section. The full text of the Act is also included as Appendix A to the Report. We wish to note that the Act was prepared internally by the Commission's legal staff, who do not have any formal training in legislative drafting. Although technical improvements will no doubt be possible, we believe that the proposed Act reflects and embodies the substance of our recommendations for reform.

1.15 Our presentation of the existing law, our recommendations for reform and our proposed Act are all premised on The Queen's Bench Rules as constituted at present. We are aware that a committee is studying the Rules for the purpose of devising a comprehensive revision thereof. Should our recommendations be implemented after the adoption of the new Rules, suitable modifications will have to be made to accommodate the Rules as revised.

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[9] *See e.g.*, R.F. Reid and H. David, *Administrative Law and Practice* (2nd ed. 1978); D.J. Mullan, *Administrative Law* (2nd ed. 1979); D. Lemieux, *le Controle judiciaire de l'action gouvernementale* (1981); J.M. Evans, H.N. Janisch, D.J. Mullan, R.C. Risk, *Administrative Law: Cases, Text, and Materials* (2nd ed. 1984); J.A. Kavanagh, *A Guide to Judicial Review* (2nd ed. 1984); R. Dussault and L. Borgeat, *Traité de droit administratif* (2e ed. 1984) Tome I [The publication of Volumes II and III, the latter of which will include a discussion of judicial review, are to follow. See also the English translation of this work by M. Rankin, *Administrative Law: A Treatise* (2nd ed. 1986) Vol. I.]; D.P. Jones and A.S. de Villars, *Principles of Administrative Law* (1985); *de Smith's Judicial Review of Administrative Action* (4th ed. J.M. Evans 1980); H.W.R. Wade, *Administrative Law* (5th ed. 1982).

CHAPTER 2

THE PRESENT LAW

2.01 Fundamental to the present system of judicial review is the concept that an administrative authority can act validly only within the scope of, and in accordance with, the powers conferred upon it, generally by statute. It is the function of the superior court, in upholding the rule of law, to determine whether an authority has acted beyond the legal limits of its powers. The court exercises this function through its inherent jurisdiction to review administrative action and determine its legality.

2.02 Judicial review is to be contrasted with an appeal. An appeal is available only where expressly conferred by statute; judicial review, on the other hand, is an exercise of the court's inherent supervisory power. When hearing an appeal, the court is generally concerned with the *merits* of the tribunal's decision: was the decision right or wrong? In judicial review proceedings, the court examines the *legality* of the decision: did the administrative authority act within its powers and according to law? Finally, an appeal may lie to another administrative body rather than to a court; judicial review in relation to the acts of provincial administrative authorities may be undertaken by a superior court only.

A. THE GROUNDS OF JUDICIAL REVIEW

2.03 Numerous specific grounds have been developed upon which the courts may review administrative acts and decisions. With one or, perhaps, two notable exceptions, these grounds are rooted in the doctrine of *ultra vires*, i.e., acting without authority.[1] They may be formulated in general terms as follows:

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[1] In some cases, acting without authority is referred to as "acting without or in excess of jurisdiction". Although the doctrine of jurisdictional error and the doctrine of *ultra vires* differ in historical origin, the terms generally may be used interchangeably. In this Report, "jurisdictional error" will be used in the broad sense of acting without or in excess of or in abuse of authority. Readers should be cautioned, however, that the term is sometimes employed in the case law in a much narrower sense. *See* H.W.R. Wade, *Administrative Law* (5th ed. 1982) 38-46, 249 *et seq*.

1) the tribunal proceeded to act in the absence of lawful authority to act;

2) the tribunal unlawfully declined to exercise its authority;

3) the tribunal committed a procedural error in the course of its decision-making process;

4) the tribunal exceeded or abused the authority with which it was entrusted;

5) the tribunal made a decision on the basis of no evidence.

Two additional grounds, which are not generally viewed as falling within the scope of the *ultra vires* doctrine, are:

6) the decision of the tribunal was affected by fraud;

7) an error of law is disclosed on the face of the record of the tribunal's proceedings.

2.04 These general categories of judicial review grounds will now be briefly examined.

1. Absence of Authority

2.05 A clear instance of an administrative body acting *ultra vires* or without authority arises where the statute pursuant to which the administrative body purports to act is itself unconstitutional. The provincial Legislature cannot, for example, create an administrative regime related to matters which fall exclusively within the legislative competence of the federal Parliament. Similarly, administrative powers cannot be validly conferred by a statutory provision which contravenes the *Canadian Charter of Rights and Freedoms*.[2] A decision of a provincial tribunal may also be found invalid if the tribunal's authorizing statute violates the *Constitution Act, 1867* by wrongfully purporting to invest the tribunal with judicial powers analogous to those exercised by a section 96 court.[3]

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[2] *Hunter* v. *Southam Inc.*, [1984] 2 S.C.R. 145; *Re Minister of National Revenue and Kruger Inc.* (1984), 13 D.L.R. (4th) 706 (F.C.A.); *Re Gershman Produce Co. Ltd. and Motor Transport Board* (1984), 14 D.L.R. (4th) 722 (Man. Q.B.), rev'd in part (1985), 36 Man. R. (2d) 81 (C.A.).

2.06 In addition to the grounds involving the unconstitutionality of governing legislation, the jurisdiction of an agency may be challenged on the basis that the agency is improperly constituted[4] or that its members have been improperly appointed.

2.07 More complex is the ground of error regarding matters preliminary or collateral to jurisdiction.[5] Preliminary matters are "matters which are regarded as a condition precedent to the obtaining of competence by the agency to consider the substantive issues".[6] The agency is authorized to act only when a particular state of affairs, as outlined by these conditions precedent, exists. Preliminary matters operate, therefore, to limit the power conferred upon an agency so that the power can be validly exercised only in certain defined circumstances. If the agency determines *wrongfully* that these preliminary conditions have been satisfied, its purported exercise of power subsequent thereto is without authority.

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[3] *Tomko* v. *Labour Relations Board (Nova Scotia)* (1975), 69 D.L.R. (3d) 250 (S.C.C.); *Attorney-General of Quebec* v. *Farrah* (1978), 86 D.L.R. (3d) 161 (S.C.C.); *Reference Re Residential Tenancies Act* (1981), 123 D.L.R. (3d) 554 (S.C.C.); *Crevier* v. *The Attorney General of the Province of Quebec*, [1981] 2 S.C.R. 220; *Re Attorney-General of Quebec and Grondin* (1983), 4 D.L.R. (4th) 605 (S.C.C.); *Attorney-General of Quebec* v. *Udeco Inc.* (1984), 13 D.L.R. (4th) 641 (S.C.C.). *See* D.J. Mullan, "The Uncertain Constitutional Position of Canada's Administrative Appeal Tribunals" (1982), 14 Ottawa L. Rev. 239.

[4] *See e.g.*, *Faurot* v. *Manitoba Horse Racing Commission* (1984), 30 Man. R. (2d) 295 (Q.B.).

[5] Matters preliminary or collateral to jurisdiction are sometimes referred to as "jurisdictional facts", although they may involve questions of fact, law or mixed law and fact.

[6] W.H. Angus, "The Individual and the Bureaucracy: Judicial Review - Do We Need It?" (1974), 20 McGill L.J. 177 at 194.

2.08 "Collateral matters" is often employed as being synonymous with "preliminary matters" and, indeed, the two concepts do tend to merge. However, a distinction can be made in that "collateral matters" more properly refers to questions which arise *in the course of* the tribunal's exercise of authority but which 'lie outside of' the main issue before the tribunal. Such questions generally involve considerations which are independent of the merits of the case, and operate to circumscribe the limits of the agency's powers.

2.09 When a case comes before an agency for determination, the agency must, of course, address any preliminary or collateral issues which arise. However, the agency's decision respecting such jurisdictional matters cannot be conclusive, for "it is a contradiction in terms to create a tribunal with limited jurisdiction and unlimited power to determine such limit at its own will and pleasure".[7] Where the agency's findings are challenged, it is for the court, not the agency, to determine finally those questions which define the scope and limits of the agency's authority.[8]

2.10 A simple example might serve to illustrate the jurisdictional fact doctrine. Suppose that a provincial government agency is empowered to take land compulsorily for housing, provided it is not a park or part of a park. The determination that a particular plot of land is *not* a park may be regarded as a matter preliminary to the exercise of the agency's power of expropriation. If, in the purported exercise of its power, the agency makes an order to expropriate Assiniboine Park in Winnipeg, the court may quash the order on the ground that a condition precedent to the exercise of the agency's power (i.e., that the subject matter not be a park) was unsatisfied.[9] Other relatively straightforward examples of preliminary matters may involve territorial limits on the agency's authority, monetary limits on the subject matter with which the agency may deal, or limitation periods for the institution of proceedings before the agency.

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[7] *The King* v. *The Assessment Committee of the Metropolitan Borough of Shoreditch*, [1910] 2 K.B. 859 at 880 (C.A.).

[8] *Re F.C. Pound Ltd. and Manitoba Labour Board*, [1955] 5 D.L.R. 126 (Man. Q.B.); *Parkhill Bedding & Furniture Ltd.* v. *International Molders & Foundry Workers Union of North America, Local 174* (1961), 26 D.L.R. (2d) 589 (Man. C.A.); *Pernisie* v. *Swan Valley School Division No.* 35 (1982), 18 Man. R. (2d) 409 (C.A.); *Warren* v. *Chapman* (1984), 29 Man. R. (2d) 172 (Q.B.), aff'd (1985), 31 Man. R. (2d) 231 (C.A.).

[9] *See* H.W.R. Wade, *supra* n. 1, at 254.

2.11 In theory, the notion of preliminary or collateral matters is simple to grasp. However, the determination that a particular matter is preliminary or collateral to jurisdiction, rather than within jurisdiction, is often at best difficult, at worst arbitrary, involving thorny questions of statutory interpretation. If a Labour Relations Board has the power to certify a union as a bargaining agent where it is "satisfied that more than 55 per cent of the employees in the bargaining unit are members of the trade union", is the Board's decision as to who are "members", in order to determine whether the requisite number of such persons exists, a question within its jurisdiction or a question collateral to its jurisdiction?[10] If a Human Rights Commission is authorized to inquire into a complaint that a person was denied occupancy of a self-contained dwelling unit because of his colour, is the finding that the premises in question are a self-contained dwelling unit a matter within the Commission's jurisdiction, or preliminary to its jurisdiction and therefore subject to the court's final determination?[11] The answers to these questions may appear far from obvious.

2.12 Generally, the court is more likely to label a matter as jurisdictional where the statutory language uses objective rather than subjective terms (e.g. "provided that the land is not part of a park" rather than "provided that in the opinion of the agency the land is not part of a park"), but this is not invariably so.[12] Another factor which may influence the court's characterization of the issue is whether or not the matter is one with respect to which the agency has particular expertise.[13]

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[10] See *Metropolitan Life Insurance Company* v. *International Union of Operating Engineers, Local 796*, [1970] S.C.R. 425.

[11] See *Bell* v. *The Ontario Human Rights Commission*, [1971] S.C.R. 756.

[12] D.J. Mullan, *Administrative Law* (2nd ed. 1979) §103; *de Smith's Judicial Review of Administrative Action* (4th ed. J.M. Evans 1980) (hereinafter referred to as "*de Smith*") 119.

[13] *Parkhill Bedding & Furniture Ltd.* v. *International Molders & Foundry Workers Union of North America, Local 174*, *supra* n. 8.

2.13 The jurisdictional fact doctrine has been severely criticized by some writers as a slippery concept by means of which courts appropriate to themselves the jurisdiction to review matters more properly left for the tribunal's final determination. Some suggest that *all* findings which a tribunal must make should be treated as matters *within* the tribunal's jurisdiction. Others suggest that the tribunal's interpretation of the scope of its powers should be reviewed, not on the basis of "correctness", but on the more limited basis of "reasonableness".[14]

2.14 The Supreme Court of Canada has warned against the over-zealous application of the jurisdictional fact doctrine, stating that courts "should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so."[15] A restrained and discriminating approach to the jurisdictional fact doctrine would undoubtedly quell much of the criticism which has been voiced against this doctrine.

2.15 Finally, a tribunal may fall into jurisdictional error at the conclusion of its decision-making process by making an order or decision which it was without authority to make.[16]

2. Declining to Exercise Authority

2.16 A public body may commit a jurisdictional error by wrongfully declining to exercise its authority. As observed by Professor Wade, "[a]ction unauthorized by law and inaction contrary to law are equally subject to the court's control."[17] Where an agency fails to perform a public duty imposed upon it by law, judicial review is available to compel its performance. An agency is under a legal duty to hear and decide any case within its jurisdiction which is properly brought before it. Accordingly, if an agency incorrectly determines that it is without jurisdiction to deal with a particular matter, the court may order the agency to exercise its authority.

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[14] For a discussion of these issues *see e.g.*, P.W. Hogg, "The Jurisdictional Fact Doctrine in the Supreme Court of Canada: Bell v. Ontario Human Rights Commission" (1971), 9 Osgoode Hall L.J. 203; D.J. Mullan, "The Jurisdictional Fact Doctrine in the Supreme Court of Canada - A Mitigating Plea" (1972), 10 Osgoode Hall L.J. 440; P.W. Hogg, "Judicial Review: How Much Do We Need?" (1974), 20 McGill L.J. 157.

[15] *Canadian Union of Public Employees Local 963* v. *New Brunswick Liquor Corporation*, [1979] 2 S.C.R. 227 at 233. *See also Blanchard* v. *Control Data Canada Limited*, [1984] 2 S.C.R. 476.

[16] *Re Syndicat des employés de production du Québec et de l'Acadie and Canada Labour Relations Board* (1984), 14 D.L.R. (4th) 457 (S.C.C.).

2.17 An agency may also be seen as failing to exercise its authority if it wrongfully delegates its powers to another person or body.[18] As well, where an agency is empowered to exercise discretion, it may not fetter its discretion by applying rigid predetermined policy to the exclusion of considering the merits of an individual case,[19] or by acting at the behest of some other person or body.[20] To do so would amount to a failure to exercise the power of decision with which the agency was entrusted.

3. Procedural Errors

2.18 An administrative decision may also be attacked on the ground that the tribunal, in arriving at its decision, failed to adhere to required matters of procedure.[21] In some cases, the legislation which creates and empowers the particular agency expressly prescribes certain mandatory procedures which must be followed by the agency when engaged in its decision-making process. In other cases, the court may interpret the governing statute as *impliedly* requiring compliance with certain standards of procedural fairness and decency. These implied procedural requirements are based on the common law principles of natural justice and the duty to act fairly.[22] Depending upon the particular circumstances of the case, these common law principles may invoke one or several or all of the following procedural elements: *notice* to affected persons of the fact that a decision is to be made; a *hearing*, that is, an opportunity for parties to make submissions to the decision-maker, either orally or in writing; *disclosure* by the decision-maker of the material facts within the decision-maker's possession upon which the decision might be based; right to be represented by *counsel* at the hearing; right to *cross-examine* parties and witnesses at the hearing. In addition, the rules require impartiality on the part of the decision-maker ("the rule against bias").

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[17] H.W.R. Wade, *supra* n. 1, at 36.

[18] *See* D.J. Mullan, *supra* n. 12, §§10-14.

[19] *See e.g.*, *Maple Lodge Farms Limited* v. *Government of Canada*, [1982] 2 S.C.R. 2; *Prime* v. *Manitoba Labour Board; Mrs. K's Food Products Ltd.* v. *United Food and Commercial Workers International Union* (1983), 25 Man. R. (2d) 85 (Q.B.), rev'd (1984), 8 D.L.R. (4th) 641 (C.A.); *Re Starlight Drive-In (1978) Ltd. and Hewitt* (1984), 12 D.L.R. (4th) 391 (B.C.S.C.); *Deptuck* v. *Law Society of Saskatchewan* (1984), 9 Admin. L.R. 275 (Sask. C.A.).

[20] *Re Alkali Lake Indian Band and Westcoast Transmission Co. Ltd.* (1984), 8 D.L.R. (4th) 610 (B.C.C.A.).

[21] For a more in-depth discussion of administrative procedures, *see* The Manitoba Law Reform Commission, *Report on Administrative Law; Part I: Procedures of Provincial Government Agencies* (Report #58, 1984), *esp.* Chapter 2.

2.19 A standard of procedural fairness may also be imposed by section 7 of the *Canadian Charter of Rights and Freedoms*: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice".[23] The requirements of this section, unlike the procedural requirements at common law, are constitutionally entrenched and cannot be negated by statute (except, of course, by express legislative declaration overriding the section pursuant to section 33 of the *Constitution Act, 1982*). Procedural protection is also afforded by paragraph 2(e) of the *Canadian Bill of Rights*[24] in relation to matters regulated by federal legislation.

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[22] *See Martineau* v. *Matsqui Institution Disciplinary Board*, [1980] 1 S.C.R. 602.

[23] Note, however, that while many of the principles of fundamental justice are procedural in nature, they are not limited solely to procedural guarantees: *Reference re Section 94(2) of the Motor Vehicle Act* (1985), 24 D.L.R. (4th) 536 (S.C.C.).

[24] R.S.C. 1970, Appendix III, as am. by S.C. 1970-71-72, c. 38, s. 29. *See Re Singh and Minister of Employment and Immigration* (1985), 17 D.L.R. (4th) 422 (S.C.C.), per Beetz J.

2.20 It is generally accepted that failure to comply with the principles of natural justice or procedural fairness constitutes a species of jurisdictional error.[25] This is based on the view that the Legislature, when conferring powers, intends that the powers be exercised in a fair manner; the exercise of powers in breach of the rules of fair procedure is therefore unauthorized. Failure to comply with mandatory statutorily-imposed matters of procedure, as well as a breach of section 7 of the *Charter*, would also constitute *ultra vires* activity.

4. Excess of Authority/Abuse of Discretion

2.21 In addition to the procedural grounds discussed separately above, there are several substantive grounds which fall under the umbrella of excess or abuse of authority. The courts have developed principles which require discretionary powers to be exercised reasonably, in good faith and only for purposes consistent with the letter and spirit of the empowering legislation.[26] Extraneous factors or irrelevant considerations must not be taken into account by the agency in arriving at its decision; conversely, all relevant factors must be taken into account.[27] The premise underlying these grounds is that discretionary power is never absolute; if exercised contrary to the scope and purpose of the empowering legislation or in an arbitrary or capricious manner, its exercise is unauthorized and the resulting act or decision may be struck down as *ultra vires*. Exercising power in a manner which violates the *Canadian Charter of Rights and Freedoms* would also constitute an excess or abuse of authority.

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[25] *L'Alliance des Professeurs Catholique de Montréal* v. *The Labour Relations Board of Québec*, [1953] 2 S.C.R. 140; H.W.R. Wade, *supra* n. 1, at 414-415; D.P. Jones and A.S. de Villars, *Principles of Administrative Law* (1985) 193-196.

[26] *See e.g.*, *Roncarelli* v. *Duplessis*, [1959] S.C.R. 121; *The Corporation of the City of Prince George* v. *Payne*, [1978] 1 S.C.R. 458; *Re Canada and City of Winnipeg* (1984), 9 D.L.R. (4th) 234 (Man. Q.B.), aff'd (1984), 15 D.L.R. (4th) 632 (Man. C.A.); *Re Dickie Dee Ice Cream Ltd. and City of Winnipeg* (1985), 28 D.L.R. (4th) 33 (Man. C.A.).

[27] *See e.g.*, *Smith & Rhuland Limited* v. *The Queen*, [1953] 2 S.C.R. 95; *Re Multi-Malls Inc. and Minister of Transportation and Communications* (1976), 14 O.R. (2d) 49 (C.A.); *Re Mrs. K's Food Products Ltd.*; *Re Prime* (1984), 8 D.L.R. (4th) 641 (Man. C.A.); *Oakwood Development Ltd*. v. *Rural Municipality of St. François Xavier*, [1985] 2 S.C.R. 164.

5. No Evidence

2.22 'No evidence' in support of an agency's determination of a matter within its jurisdiction also constitutes a ground of review, although there is some uncertainty as to its exact nature and scope.[28] It is generally viewed as a species of jurisdictional error,[29] either as constituting a breach of natural justice[30] or as a separate ground based on the premise that the Legislature did not authorize the agency to reach a decision unsupported by any evidence.[31] There is, however, some authority suggesting that 'no evidence' is merely an error of law *within* jurisdiction.[32] The significance of whether an error is jurisdictional as opposed to one within jurisdiction will be discussed later in this Chapter.

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[28] For an in-depth review of this ground, *see* D.W. Elliott, "'No Evidence': A Ground of Judicial Review in Canadian Administrative Law?" (1972), 37 Sask. L. Rev. 48. *See also* B. Bowman, "Judicial Review - 'No Evidence'" (1984), 14 Man. L.J. 195.

[29] *Attorney General of the Province of Quebec* v. *Labrecque*, [1980] 2 S.C.R. 1057; *Re Keeprite Workers' Independent Union and Keeprite Products Ltd.* (1980), 29 O.R. (2d) 513 (C.A.); *Re McInnes and Simon Fraser University* (1982), 140 D.L.R. (3d) 694 (B.C.S.C.), aff'd (1984), 3 D.L.R. (4th) 708 (B.C.C.A.).

[30] *Swan Valley Division Association No. 35 of the Manitoba Teachers' Society* v. *Swan Valley School Division No. 35* (1983), 25 Man. R. (2d) 236 (Q.B.); *semble Cohen* v. *Minister of Manpower & Immigration*, [1974] 1 F.C. 317 (C.A.).

[31] *W. W. Construction (1972) Ltd.* v. *Manitoba Labour Board*, [1975] 1 W.W.R. 222 (Man. Q.B.).

[32] *Davies* v. *Price*, [1958] 1 W.L.R. 434 (C.A.); *Woodward Stores (Westmount) Limited* v. *Alberta Assessment Appeal Board Division No. 1*, [1976] 5 W.W.R. 496 (Alta. S.C.); *Northern Telecom Limited* v. *Winnipeg* (1985), 34 Man. R. (2d) 233 (Q.B.).

2.23 It is generally stated that in judicial review proceedings, the court may intervene only where there is a complete lack of evidence to support the agency's finding; the court is not to review the weight or sufficiency of evidence. Sometimes the test is framed in terms of whether there is some evidence logically capable of supporting the agency's conclusions or whether there was some material of probative value before the tribunal.[33] The line between the *existence* of evidence and the *sufficiency* of evidence is, of course, not easily drawn. However, courts usually do exercise restraint in reviewing questions of fact and evidence, the determination of which lies within the scope of the agency's authority. It is recognized that the weighing of evidence by the court is an appellate function, rather than one appropriately exercised in judicial review proceedings.[34]

6. Fraud by a Party

2.24 Where a decision of a tribunal has been obtained by fraud, such as by perjured evidence by a party or by a witness acting in collusion with the party, the decision may be quashed. Fraud in relation to a material issue which could reasonably be considered as having operated to 'tip the scale' in favour of the fraudulent party must be demonstrated in order for the court to intervene.[35] It is not clear whether this is an independent ground of review, or whether it falls within the scope of the doctrine of *ultra vires*.[36]

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[33] *Re McInnes and Simon Fraser University, supra* n. 29. *Compare with* the related proposition that an unreasonable finding of fact made by a tribunal in the course of exercising its authority constitutes a jurisdictional error with respect to which the court may intervene in judicial review proceedings: *Blanchard* v. *Control Data Canada Limited, supra* n. 15, per Lamer J.

[34] *City of Vancouver* v. *Brandram-Henderson of B.C. Ltd.* (1960), 23 D.L.R. (2d) 161 (S.C.C.).

[35] R. v. *Saskatchewan Labour Relations Board* (1969), 6 D.L.R. (3d) 296 (Sask. Q.B.); H.L. Molot, "Annual Survey of Canadian Law Part 2 - Administrative Law" (1971), 4 Ottawa L. Rev. 458 at 467.

[36] *See* Royal Commission Inquiry into Civil Rights, Ontario (1968), Report

(Footnote continued to page 19)

7. Error of Law on the Face of the Record

2.25 To this point, all the grounds which have been discussed (with the possible exception of "fraud by a party") can be viewed as specific applications of the *ultra vires* doctrine. The essential question raised by these grounds is whether the agency has acted within the limits of, and in accordance with, its powers.

2.26 There exists, however, a separate ground of review - error of law on the face of the record - which is not rooted in the *ultra vires* doctrine. Review on the basis of this ground is exceptional because the court has the power to quash even though the agency has acted within the scope of its authority, i.e., even though the error is intra-jurisdictional or within jurisdiction.

2.27 The development of this anomalous ground of judicial review lies in history rather than logic.[37] In the seventeenth century, certiorari was used to call up the record of an inferior court to the Court of King's Bench. The superior court then examined the record for patent errors. However, as review of the record became increasingly formal and orders were being quashed for mere technical defects, the English Parliament reacted by inserting

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(Footnote continued from page 18)
No. 1, Vol. 1 (Hon. J.C. McRuer), at 248-249, where it is suggested that

> . . . the effect of fraudulent action by one of the parties misleading the tribunal is in reality another instance of the application of the principle of *ultra vires*. The tribunal is misled by the fraudulent acts so that it is prevented from directing its mind to the proper questions to be decided and the proper considerations. It does not therefore act within the power conferred on it.

But see Anisminic Ltd. v. *Foreign Compensation Commission*, [1969] 2 A.C. 147 at 170 (H.L.).

[37] For a discussion of the historical development of error of law on the face of the record, *see R.* v. *Northumberland Compensation Appeal Tribunal*, [1952] 1 K.B. 338 (C.A.); H.W.R. Wade, *supra* n. 1, at 272-276; *de Smith*, *supra* n. 12, at 400-404.

"no-certiorari clauses" into its statutes and, in some cases, by statutorily limiting the content of the record to exclude evidence and reasons. This all but eliminated the opportunity for detecting errors of law on the face of the record, and the ground of review fell into disuse until the mid-twentieth century. By then, tribunals had increased greatly both in number and power; few rights of appeal from the decisions of these tribunals were provided for by statute. These circumstances led to the revival in 1950 of error of law on the face of the record as a ground of judicial review.[38]

2.28 Generally, an error of law takes the form of a misinterpretation of a statutory or contractual term or a misapplication of a legal standard.[39] Admitting improper evidence or applying the incorrect onus of proof may also constitute intra-jurisdictional error of law.

2.29 Error of law on the face of the record differs from other grounds of review in several respects. As mentioned previously, it is not related to the *ultra vires* doctrine. Because of this, it may be suggested that it is more properly dealt with by the court when exercising appellate, rather than supervisory, jurisdiction.

2.30 Furthermore, when reviewing for intra-jurisdictional error of law, the court is restricted to an examination of the record of the tribunal's proceedings. At common law, the definition of "record" is somewhat uncertain, but it is regarded generally as including only initiating documents, 'pleadings' and the tribunal's decision (but not a minority decision[40]).[41] Evidence and any reasons given by the tribunal for its decision have traditionally been held not to be included unless the tribunal incorporates them either by reference in the actual order or decision[42] or by physically connecting them to 'record documents'.[43] As a result, error can remain undisclosed, and therefore remain unreviewable, if the tribunal provides a mere skeleton record for the court's consideration. In contrast, the court is not limited to the record when reviewing for jurisdictional error. The transcript of evidence, if any, and the reasons for decision, if given, may be examined even if not part of the record. Also, extrinsic evidence by way of affidavit or, exceptionally, *viva voce* testimony[44] is admissible to demonstrate jurisdictional error.[45]

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[38] *R.* v. *Northumberland Compensation Appeal Tribunal*, [1951] 1 K.B. 711, aff'd [1952] 1 K.B. 338 (C.A.). For a statement of the law prior to this case, *see e.g.*, *Racecourse Betting Control Board* v. *Secretary of State for Air*, [1944] 1 All E.R. 60 (C.A.).

[39] Whether any such errors remain to be characterized as *within* jurisdiction, following the landmark case of *Anisminic Ltd.* v. *Foreign Compensation Commission*, *supra* n. 36, is a matter of some controversy, at least in England. *See* H.W.R. Wade, *supra* n. 1, at 264-267; *de Smith*, *supra* n. 12, at 120-121, 396. The Canadian position on this issue will be more fully addressed later in this Chapter.

2.31 It has been established that the court's power to review the decisions of provincial statutory authorities for jurisdictional error is constitutionally guaranteed.[46] As a result, privative clauses which attempt to exclude judicial review are ineffective with respect to errors of jurisdiction. Where, however, the defect alleged is error of law on the face of the record, a privative clause may be effective to oust the court's power of review.

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[40] *Manitoba Telephone System* v. *Greater Winnipeg Cablevision Limited* (1984), 26 Man. R. (2d) 173 (C.A.).

[41] *R.* v. *Northumberland Compensation Appeal Tribunal*, *supra* n. 37; A.S. Abel, "Materials Proper for Consideration in Certiorari to Tribunals: I" (1963), 15 U.T.L.J. 102; R.F. Reid and H. David, *Administrative Law and Practice* (2nd ed. 1978) 387 *et seq*.

[42] *But see* the discussion in *R.* v. *Knightsbridge Crown Court*, [1981] 3 W.L.R. 640.

[43] *The Labour Relations Board (B.C.)* v. *Canada Safeway Limited*, [1953] 2 S.C.R. 46.

[44] *Infra* n. 69.

[45] In light of the limitations on the content of the record, the significance of whether 'no evidence', discussed previously, is treated as a jurisdictional error or as an intra-jurisdictional error of law becomes apparent. If the latter, it will only be a viable ground of review if the tribunal has included as a part of its record all of the evidence upon which it based its findings. Otherwise, it would be virtually impossible for a court to determine that there actually was no evidence introduced to support the tribunal's conclusions. *See* D.W. Elliott, *supra* n. 28, at 89; *Woodward Stores (Westmount) Limited* v. *Alberta Assessment Appeal Board Division No. 1*, *supra* n. 32; *Northern Telecom Limited* v. *Winnipeg*, *supra* n. 32.

2.32 The commission of a jurisdictional error will, for most purposes, render the act or decision a nullity. Error of law on the face of the record, however, does not affect the validity of the decision. A final distinction is that, at common law, error of law on the face of the record would appear to be available as a ground of review in certiorari, but not declaratory, proceedings.[47]

2.33 The foregoing may be described as a traditional analysis of intra-jurisdictional error of law. However, the law respecting the scope of judicial review of administrative action is at present in a state of flux; one senses that the courts are grappling with the difficult task of re-defining and establishing the proper balance between administrative autonomy and judicial control.

2.34 The modern source of confusion (or elucidation, depending on one's perspective) respecting the nature of error of law lies in the landmark case of *Anisminic Ltd.* v. *Foreign Compensation Commission*,[48] a decision of the House of Lords in England. While establishing that errors involving a breach of the rules of natural justice, bad faith, taking into account irrelevant considerations, etc. constitute jurisdictional errors, the court also suggested that a tribunal may fall into jurisdictional error if it has "misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it".[49] This broad 'wrong question' test of jurisdiction arguably left little or no scope for intra-jurisdictional error: could it not be said that *any* error in the interpretation or application of a statutory provision resulted in the tribunal asking itself the wrong question and, thereby, stepping outside its authority? The initial response of the Supreme Court of Canada, applying *Anisminic* with a broad stroke, suggested that this may indeed be the case.[50]

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[46] *Crevier* v. *The Attorney General of the Province of Quebec*, *supra* n. 3.

[47] *Infra* n. 94.

[48] *Supra* n. 36.

2.35 However, in a series of landmark decisions, the Supreme Court has refined and narrowed the 'wrong question' test of jurisdiction, clearly leaving room for certain errors of law to remain within the category of errors *within* jurisdiction. It is now established that an error of law committed by a specialized tribunal operating within its area of authority and expertise will assume jurisdictional proportion only where the tribunal's interpretation of the law is patently unreasonable.[51] If the tribunal has interpreted the law reasonably, even if the court disagrees with its interpretation, the "error" remains one within jurisdiction and is therefore capable of being immunized from review by a privative clause.

2.36 It at first appeared that this standard of "reasonableness" applied only where the tribunal's decision was protected by a privative clause which limited review to errors going to jurisdiction. In the absence of a privative clause, it was expected that full review for intra-jurisdictional error of law would continue on the more stringent basis of "correctness".[52] There has emerged some authority, however, which suggests that, even in the absence of a clause prohibiting judicial review, the court will review determinations of law within the tribunal's area of authority only where the tribunal's interpretation of the law was unreasonable,[53] i.e., only where the error assumed jurisdictional proportion.

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[49] *Supra* n. 36, at 171.

[50] *Metropolitan Life Insurance Company* v. *International Union of Operating Engineers, Local 796*, *supra* n. 10.

[51] *Service Employees' International Union, Local No. 333* v. *Nipawin District Staff Nurses Association*, [1975] 1 S.C.R. 382; *Canadian Union of Public Employees Local 963* v. *New Brunswick Liquor Corporation*, *supra* n. 15; *Teamsters Union Local 938* v. *Massicotte* (1982), 134 D.L.R. (3d) 385 (S.C.C.); *Canada Labour Relations Board* v. *Halifax Longshoremen's Association* (1983), 144 D.L.R. (3d) 1 (S.C.C.); *Re United Headwear, Optical & Allied Workers Union of Canada, Local 3 and Biltmore/Stetson (Canada) Inc.* (1983), 150 D.L.R. (3d) 577 (Ont. C.A.); *Re B.C. Coal Ltd. and United Mine Workers of America, Local 7292* (1984), 12 D.L.R. (4th) 243 (B.C.C.A.); *Bibeault* v. *McCaffrey* (1984), 6 Admin. L.R. 239 (S.C.C.); *Re Syndicat des employés de production du Quebec et de l'Acadie and Canada Labour Relations Board*, *supra* n. 16; *Blanchard* v. *Control Data Canada Limited*, *supra* n. 15.

2.37 On the other hand, the judicial deference exhibited by the test of unreasonableness has been held not to apply, even in the face of a privative clause, where the tribunal is interpreting a general question of law which extends beyond the confines of the tribunal's governing statute or area of expertise.[54] In such cases, where the tribunal ventures outside its domain of specialization, the court may exercise its full powers of review using the standard of "correctness". The conceptual framework for this exception to the deference principle has not been clearly articulated, although it bears resemblance to the notion of questions of law which are "collateral" to those matters within the tribunal's area of authority.[55] That is, judicial deference would not extend to cases where "the point for determination involve[s] an examination of legal principles and considerations that [go] beyond the simple confines of the statute under which the [tribunal] operate[s]".[56] As such, this "exception" would merely be an application of the general principle that the test of unreasonableness applies only to those matters traditionally viewed as non-jurisdictional.

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[52] *See e.g.*, *Yellow Cab Ltd.* v. *Board of Industrial Relations*, [1980] 2 S.C.R. 761. From the use of the terms "error" of law and "correctness", however, it should not be inferred that statutory provisions necessarily have one obviously correct meaning. Many statutory provisions are open to a range of reasonable interpretations; the question is, whose interpretation will prevail? When applying the standard of "reasonableness", the court defers to the tribunal's interpretation, even if the court disagrees with it, unless the tribunal's interpretation falls outside the range of reasonable construction. When applying the standard of "correctness", the court will substitute its own view of the statute's "correct" meaning for that of the tribunal, even though the construction adopted by the tribunal could be considered a reasonable alternative. For a very recent and useful discussion of statutory interpretation and the test of "reasonableness", *see* H.W. MacLauchlan, "Judicial Review of Administrative Interpretations of Law: How Much Formalism Can We Reasonably Bear?" (1986), 36 U.T.L.J. 343.

[53] *The Alberta Union of Provincial Employees* v. *The Board of Governors of Olds College*, [1982] 1 S.C.R. 923; *United Nurses of Alberta, Local 11* v. *Misericordia Hospital*, [1983] 6 W.W.R. 1 (Alta. C.A.); *Vooght* v. *Director of Employment Standards of British Columbia* (1985), 14 Admin. L.R. 307 (B.C.S.C.). *See also* the dicta in *Re Skogman and the Queen* (1984), 11 D.L.R. (4th) 161 at 167 (S.C.C.). For another possible interpretation of the *Olds College* case, *above*, *see* the discussion in *Ontario Public Service Employees Union* v. *Forer* (1985), 15 Admin. L.R. 145 (Ont. C.A.).

2.38 To summarize the *apparent* trend in the law where an administrative tribunal commits an error of law involving a misinterpretation of a statutory provision or misapplication of a legal standard:

a) If the error pertains to a matter which is within the area of the tribunal's expertise and involves the interpretation of its "home statute", or otherwise relates to a matter which the Legislature can be deemed to have confided to the tribunal for its exclusive determination, the court will review the tribunal's decision only where the tribunal's interpretation of the law is patently unreasonable, i.e., only where the interpretation is so unreasonable that the tribunal in effect transcended the rational limits of its authority. This standard clearly applies when the tribunal's decision is protected by a privative clause ousting the court's power of review and may apply even in the absence of such a clause.

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[54] *Re Service Employees' International Union, Local 204 and Broadway Manor Nursing Home* (1983), 4 D.L.R. (4th) 231 (Ont. Div. Ct.), aff'd on this point (1984), 13 D.L.R. (4th) 220 (Ont. C.A.); *Re Alberta Union of Provincial Employees and Town of Bonnyville* (1984), 8 D.L.R. (4th) 559 (Alta. Q.B.); *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union* v. *MacDonalds Consolidated Ltd*. (1985), 43 Sask. R. 260 (Sask. C.A.), per Vancise J.A.

[55] *See Parkhill Bedding & Furniture Ltd*. v. *International Molders & Foundry Workers Union of North America, Local 174, supra* n. 8.

[56] *Id*., at 596.

b) If the error pertains to a matter which is outside the confines of the tribunal's expertise and involves the application of legal principles which extend beyond the scope of the tribunal's governing statute, the court will exercise full powers of review.

Such an approach to judicial review for error of law demonstrates respect for an administrative tribunal's expertise within the area confided to it by the Legislature, while acknowledging the court's role as guardian of general legal principles and values.

2.39 It must be reiterated, however, that the law is in a state of flux and evolution; no conclusive statement can be made with respect to the present scope of judicial review for error of law. It is also important to note that many of these recent developments have occurred in the context of judicial review of the decisions of labour relations tribunals and, to a lesser extent, workers compensation boards; the question remains as to whether the same principles will extend generally to the review of decisions outside of this limited set of tribunals. In principle there seems to be no reason for confining the "unreasonableness doctrine" to a select group of administrative authorities. An exception may be warranted, however, where a decision-maker cannot be said to bring to the decision-making process any specialized knowledge or expertise in relation to the context and purpose of the legislative scheme which it administers. In such circumstances, according curial deference to the decision-maker's interpretations of the law would likely be inappropriate.

B. THE REMEDIES

2.40 The remedies at present available to provide redress for unlawful administrative action form the structural foundation of the law of judicial review. Their significance arises not merely in determining the nature of relief afforded to the successful litigant at the end of a day in court; rather the remedies themselves, to a large extent, govern the entire review proceedings.

2.41 The main remedies available to the Court of Queen's Bench to review the acts and decisions of administrative bodies may be divided into two classes. The first embraces the prerogative orders, in particular, certiorari, prohibition and mandamus. The second contains the remedies of declaration and injunction, originally developed in the realm of private law.

2.42 The following is intended to provide a brief overview of the law relating to these two classes of administrative law remedies. The seldom-sought prerogative order of quo warranto will also be briefly addressed.

1. Certiorari and Prohibition

(a) Introduction

2.43 Certiorari and prohibition exist as complementary remedies, differing essentially only in the timing of application. Certiorari issues to quash a decision which is *ultra vires* or tainted by error of law on the face of the record.[57] Prohibition issues to restrain a person or body from engaging in *ultra vires* activity.

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[57] Strictly speaking, an order of certiorari issues to compel an inferior tribunal to deliver the record of proceedings before it to the superior court for review. Usually, the application for certiorari is accompanied by a request for an order setting aside or quashing the inferior tribunal's decision. Traditionally, this involved a two-stage proceeding, that is, an application would be made for certiorari and, once certiorari issued and a return of the record was made pursuant thereto, the application to quash would be considered by the court (*see* The Queen's Bench Rules (hereinafter noted as "Q.B.R."), Form 86). However, the established practice in Manitoba is that an originating notice is filed requesting an order of certiorari and an order to quash the decision, and, without the issuance of certiorari, the inferior tribunal makes a return of the record. Thereafter, the legality of the proceedings before the tribunal is examined by the reviewing court. The two-stage proceeding is used only in the rare circumstances where the tribunal refuses to provide a record after service of the originating notice of motion or where there is some dispute as to what documents comprise the record. Because an application for certiorari is so frequently combined with an application to quash in a single proceeding, "certiorari" is often used alone to denote an order to set aside a decision.

2.44 Both remedies were originally used by the common law Courts of the King's or Queen's Bench in England to ensure that inferior courts did not exceed their jurisdiction. This historical role, which focused on protecting the royal prerogative rather than individual rights, has coloured the development of the scope and availability of these remedies, particularly with respect to the rules of *locus standi* which govern the entitlement of a person to institute judicial proceedings.

(b) Scope

2.45 In recent tradition, certiorari and prohibition were considered appropriate remedies to challenge only the decisions of bodies which were under a duty "to act judicially".[58] This requirement led to the bifurcation of the functions of administrative agencies. Those classified as judicial or quasi-judicial were amenable to certiorari and prohibition; those classified as administrative or ministerial were not. The demarcation between these categories has been notoriously plagued with difficulty.

2.46 The ruling of the Supreme Court of Canada in *Martineau* v. *Matsqui Institution Disciplinary Board* has diminished, to some extent at least, the significance of the judicial/administrative dichotomy in determining the availability of certiorari:

> *Certiorari* is available as a general remedy for supervision of the machinery of government decision-making. The order may go to any public body with power to decide any matter affecting the rights, interests, property, privileges, or liberty of any person. The basis for the broad reach of this remedy is the general duty of fairness resting on all public decision-makers.[59]

This case has established that certiorari is available for violations of the rules of procedural fairness without regard to the judicial/administrative classification. However, the grounding of the availability of certiorari in the duty of fairness, rather than in the doctrine of *ultra vires*, leaves open the question of whether certiorari and prohibition will emerge as general administrative law remedies to challenge decisions traditionally classified as administrative on grounds other than breach of procedural fairness.[60]

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[58] *R.* v. *Electricity Commissioners*, [1924] 1 K.B. 171 (C.A.).

[59] *Supra* n. 22, at 628, per Dickson J. (as he then was).

2.47 The remedies are not limited to controlling final decision-makers. Bodies which investigate, recommend or report are amenable to certiorari and prohibition if these activities form an integral part of the decision-making process.[61]

2.48 Because of their public law nature, certiorari and prohibition generally lie only against public bodies, which, in most cases, derive their powers from statute.[62] They ordinarily are not available against the

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[60] The Federal Court of Canada recently has indicated that certiorari is available in relation to administrative decisions irrespective of the grounds of review raised. *See Re Minister of National Revenue and Kruger Inc.*, *supra* n. 2, at 713 wherein Pratte J. stated:

> Once it is accepted . . . that purely administrative decisions are no longer immune from *certiorari*, it follows, in my view, that those decisions may be quashed by *certiorari* not only, in appropriate cases, for lack of procedural fairness but also for lack of jurisdiction and error of law on the face of the record . . . .

See also Lapointe v. *Minister of Fisheries and Oceans* (1984), 9 Admin. L.R. 1 (F.C.,T.D.).

In addition, it has been recently suggested that, despite traditional assertions to the contrary, certiorari is also available to challenge the validity of subordinate legislation: *Le Groupe des éleveurs de volailles de l'est de l'Ontario* v. *Canadian Chicken Marketing Agency*, [1985] 1 F.C. 280 (T.D.).

[61] *Manitoba Pool Elevators* v. *Assiniboine Park-Fort Garry Community Committee*, [1978] 2 W.W.R. 486 (Man. Q.B.); *Re McGavin Toastmaster Ltd. and Powlowski* (1973), 37 D.L.R. (3d) 100 (Man. C.A.); *Re Haber and Medical Advisory Committee of the Wellesley Hospital* (1986), 31 D.L.R. (4th) 607 (Ont. Div. Ct.).

[62] Although the remedies will lie against *public* bodies created other than by statute. *See R.* v. *Criminal Injuries Compensation Board*, [1967] 2

(Footnote continued to page 30)

governing bodies of private organizations and other domestic tribunals.[63]

2.49 The fact that the body against which relief is sought is not a suable entity does not prevent the institution of proceedings for a prerogative remedy.[64]

2.50 It is generally stated that, while certiorari and prohibition will lie against individual Ministers of the Crown, they are not available against the Crown itself. However, the Manitoba Court of Appeal has held that the fact that the Crown is a party to proceedings does not bar the issuing of certiorari.[65]

(c) Procedure

2.51 Pursuant to Queen's Bench Rule 556, certiorari and prohibition are sought by originating notice of motion. Applications are generally heard by a judge of the Court of Queen's Bench. However, the Manitoba Court of Appeal also has inherent and original jurisdiction to grant prerogative relief, which jurisdiction is sparingly exercised.[66]

(Footnote continued from page 29)

Q.B. 864 where a government body established by executive action, rather than by statute, was amenable to certiorari.

[63] *See*, however, the discussion in §5.241 in Chapter 5 of this Report.

[64] D.J. Mullan, *supra* n. 12, §201.

[65] *Re Gooliah and Minister of Citizenship and Immigration* (1967), 63 D.L.R. (2d) 224 (Man. C.A.). In that case, however, the powers of a Special Inquiry Officer pursuant to the *Immigration Act* were being challenged, and the naming of the Crown as respondent, as opposed to the officer, was labelled a technical point. The case did not involve a challenge to the exercise of prerogative powers or statutory powers vested directly in the Crown. *See also Carlic* v. *The Queen and Minister of Manpower and Immigration* (1967), 65 D.L.R. (2d) 633 (Man. C.A.). *Compare with Border Cities Press Club* v. *The Attorney-General for Ontario*, [1955] O.R. 14 (C.A.).

[66] *In Re McEwan* (1941), 48 Man. R. 189 (C.A.), aff'd [1941] S.C.R. 542; *Re*

(Footnote continued to page 31)

2.52 Where review is sought for intra-jurisdictional error of law, the court is confined to an examination of the record; where the error alleged is jurisdictional, the court is not so confined. Extrinsic evidence is generally presented by way of affidavit, which is restricted to a statement of facts within the knowledge of the deponent.[67] Cross-examination on the affidavit may be permitted.[68] *Viva voce* evidence has also been admitted in certiorari proceedings in relation to questions of jurisdiction.[69]

2.53 No provision is made for discovery with respect to proceedings initiated by originating notice of motion. However, Queen's Bench Rule 539(1) empowers the court to direct the trial of any issue raised on the hearing of an originating notice of motion.

2.54 Interim relief by way of injunction is not available in prerogative proceedings. However, the court likely does have the power to stay proceedings before the tribunal, pending the determination of an application for prerogative relief.[70]

(Footnote continued from page 30)
Morton and Municipal Board of Manitoba (1981), 126 D.L.R. (3d) 734 (Man. C.A.).

[67] Q.B.R., r. 228 and r. 262; *R.* v. *Manitoba Labour Board* (1965), 51 D.L.R. (2d) 743 (Man. Q.B.).

[68] Q.B.R., r. 229; *Re F.C. Pound Ltd. and Manitoba Labour Board*, *supra* n. 8.

[69] *Re Mid-West By-Products Co. and Clean Environment Commission* (1979), 102 D.L.R. (3d) 208 (Man. Q.B.).

[70] *Compare Canadian Automatic Sprinkler Association* v. *Nova Scotia Labour Relations Board* (1974), 15 N.S.R. (2d) 89 (S.C., T.D.) and *Daciuk* v. *Labour Board (Man.)* (1985), 34 Man. R. (2d) 286 (Q.B.) *with Re Cedarvale Tree Services Ltd. and Labourers' International Union of North America, Local 183* (1971), 22 D.L.R. (3d) 40 (Ont. C.A.). *See* J.A. Kavanagh, *A Guide to Judicial Review* (2nd. ed. 1984) 167; D.J. Mullan, "Recent Developments in Nova Scotian Administrative Law" (1978), 4 Dalhousie L.J. 467.

(d) *Locus standi*

2.55 *Locus standi* denotes entitlement to institute legal proceedings, and is generally dependent upon the nature of the applicant's interest in the subject matter of the proceedings. Various tests for standing in relation to certiorari and prohibition have been advanced, rendering the law somewhat complex and uncertain.[71]

2.56 Under the most widely-supported test, the question of entitlement to institute proceedings for certiorari or prohibition is intertwined with the question of entitlement to relief. It has been said that anyone can apply for the remedies. Where the applicant is a "mere stranger", relief is purely discretionary.[72] However, if the applicant is a "person aggrieved", the applicant will be entitled to the remedy *ex debito justitiae* ("as a matter of right"),[73] unless relief is precluded by the applicant's own conduct.

2.57 While some cases have afforded the term "person aggrieved" a narrow interpretation, courts have generally required only that the applicant demonstrate some interest over and above that of the general public. Lord Denning has offered the following statement on the question of standing:

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[71] *See* S.M. Thio, *Locus Standi and Judicial Review* (1971), L.A. Stein (ed.), *Locus Standi* (1979) and T.A. Cromwell, *Locus Standi: A Commentary on the Law of Standing in Canada* (1986) for a thorough review and analysis of the case law.

[72] *R.* v. *Thames Magistrates' Court* (1957), 55 L.G.R. 129. *See also Thorson* v. *Attorney-General of Canada (No. 2)* (1974), 43 D.L.R. (3d) 1 at 18 (S.C.C.). However, as noted by S.M. Thio, *ibid.*, an examination of the cases which have granted relief to a "stranger" indicates that, while the applicant may have been a stranger in the sense of not being directly involved in the impugned proceedings, the applicant always had some interest in, or was in some way affected by, the proceedings. It is therefore unlikely that relief would be granted to a person with no interest whatsoever in the subject matter of the proceedings.

[73] *R.* v. *Thames Magistrates' Court*, *ibid.* *See also R.* v. *The Justices of Surrey* (1870), L.R. 5 Q.B. 466; *Young* v. *Attorney-General of Manitoba* (1960), 25 D.L.R. (2d) 352 (Man. C.A.).; *R.* v. *Vancouver Zoning Board of Appeal* (1966), 60 D.L.R. (2d) 331 (B.C.C.A.); *Victoria General Hospital* v. *Registrar of Motor Vehicles* (1984), 9 Admin. L.R. 255 (Man. C.A.).

> The writs of prohibition and certiorari lie on behalf of any person who is a 'person aggrieved', and that includes any person whose interests may be prejudicially affected by what is taking place. It does not include a mere busybody who is interfering in things which do not concern him; but it includes any person who has a genuine grievance because something has been done or may be done which affects him . . . .[74]

This interpretation has been favourably received in Canada.[75]

(e) Discretion in granting certiorari and prohibition

2.58 However otherwise meritorious the claim for prerogative relief, the granting or withholding of relief lies within the discretion of the court.[76] The following are most frequently cited as considerations upon which the court may exercise its discretion to refuse relief:[77]

i) undue delay by the applicant, particularly if the delay is prejudicial to other parties or would cause substantial inconvenience;

ii) unmeritorious conduct by the applicant or improper motives;

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[74] *Re Liverpool Taxi Owners' Association*, [1972] 2 All E.R. 589 at 595 (C.A.).

[75] *Re Doctors Hospital and Minister of Health* (1976), 68 D.L.R. (3d) 220 (Ont. Div. Ct.); *Re City of Kingston and Mining and Lands Commissioner* (1977), 18 O.R. (2d) 166 (Div. Ct.). *See also John Graham & Company Limited* v. *Canadian Radio-Television Commission*, [1976] 2 F.C. 82 at 93 (C.A.); *W.A.W. Holdings Ltd.* v. *Summer Village of Sundance Beach*, [1980] 1 W.W.R. 97 at 105 (Alta. Q.B.), rev'd on other grounds [1981] 1 W.W.R. 581 (Alta. C.A.); *F.P. Publications (Western) Limited* v. *Conner Prov. J.*, [1980] 1 W.W.R. 504 (Man. C.A.).

[76] There is some suggestion in the case law that a court has no discretion to refuse prohibition for patent defects of jurisdiction. The existence of this anomalous rule, however, is open to question. *See de Smith*, *supra* n. 12, at 416-418.

[77] *See e.g.*, *Young* v. *Attorney-General of Manitoba*, *supra* n. 73, *esp*. Freedman J.A. (as he then was) in dissent.

iii) acquiescence or waiver by the applicant in the impugned proceedings;

iv) existence of a technical defect rather than one that is fundamental in nature;

v) availability of another equally effective and convenient remedy;

vi) granting of relief being contrary to the public interest.

All these are merely factors which the court may consider; none operates as a bar to relief.

2. Mandamus

(a) Introduction

2.59 Mandamus is a prerogative remedy, used to compel the performance of a public duty by a public authority. Historically, it was developed to serve the dual purpose of protecting the citizen and supervising inferior tribunals in the interests of good government.

2.60 Mandamus will lie when an authority that is required to perform a duty fails to so do. Generally, it must be demonstrated that performance is due and incumbent, that there has been a demand for performance, and that the authority has refused to perform its duty, although in some circumstances, mere failure to act may be held tantamount to a refusal. Where the challenged duty is a duty to exercise a discretion, mandamus may issue to compel the exercise of the discretion but not to compel its exercise in favour of a particular result.[78] Mandamus is also available to remedy the improper exercise of a public function; in such a case, the authority may be compelled to act according to law.[79]

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[78] *Poizer* v. *Ward*, [1947] 4 D.L.R. 316 (Man. C.A.); *Campeau Corporation* v. *Council of City of Calgary* (1978), 8 M.P.L.R. 88 (Alta. S.C., App. Div.); *Re Petrashuyk and Law Society of Alberta* (1983), 5 D.L.R. (4th) 592 (Alta. Q.B.), rev'd (1984), 16 D.L.R. (4th) 22 (Alta. C.A.), leave to appeal to the Supreme Court of Canada granted March 4, 1985.

[79] In this respect, mandamus is often sought in conjunction with prohibition or certiorari.

(b) Scope

2.61 The availability of mandamus is not dependent upon the classification of a function; judicial, quasi-judicial, administrative and ministerial duties are all amenable to this remedy in appropriate circumstances.[80] However, the duty must be one of a public nature. Hence, mandamus generally will not issue against private organizations or domestic tribunals.[81]

2.62 The availability of mandamus against the Crown is restricted. It will not issue against the Crown *per se*, nor against a Crown servant who is merely discharging duties owed by or to the Crown. Where, however, a duty is cast upon a particular official for the benefit of the public or a segment thereof, mandamus will lie.[82]

(c) Procedure

2.63 As with certiorari and prohibition, mandamus is sought by originating notice of motion[83] before a judge of the Queen's Bench. Evidence is normally presented by way of affidavit.

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[80] *Campeau Corporation* v. *Council of City of Calgary*, *supra* n. 78; *Re Petrashuyk and Law Society of Alberta*, *supra* n. 78.

[81] D.J. Mullan, *supra* n. 12, §174. *But see Re Morris and Morris* (1973), 36 D.L.R. (3d) 447 (Man. Q.B.), rev'd (1973), 42 D.L.R. (3d) 550 (Man. C.A.) for a highly unusual application of this remedy, compelling an individual to institute religious proceedings.

[82] *The Queen* v. *Leong Ba Chai*, [1954] S.C.R. 10. These distinctions respecting the availability of mandamus against the Crown and its servants appear somewhat artificial and difficult to justify in principle. For expressions of dissatisfaction with the common law position, *see* H.W.R. Wade, *supra* n. 1, at 645-647; P.W. Hogg, *Liability of the Crown* (1971) 13-14; The Law Commission (England), "Remedies in Administrative Law" (Working Paper No. 40, 1971) 27; Law Reform Commission of British Columbia, *Report on Civil Rights: Part I - Legal Position of the Crown* (Report No. 9, 1972) 34.

Note, however, that where a breach of duty under the *Canadian Charter of Rights and Freedoms* is established, mandamus may lie against the Crown and its representatives: *Levesque* v. *Attorney-General of Canada* (1985), 25 D.L.R. (4th) 184 (F.C., T.D.).

(d) *Locus standi*

2.64 Traditionally, it has been said that the rules of standing for mandamus are more stringent than those for certiorari and prohibition. However, at present, the law is in a state of evolution and it is difficult to define precisely the interest required to support an application for this remedy.

2.65 An application of the traditional approach is found in *Hughes* v. *Henderson and Portage la Prairie (City)*[84] where the applicant ratepayers sought mandamus to compel the City to commence an action for specific performance with respect to an agreement for the sale of property. The Manitoba Court of Queen's Bench reviewed the authorities and denied standing, quoting with approval, *inter alia*, the following:

> The Court has never exercised a general power to enforce the performance of their statutory duties by public bodies on the application of anybody who chooses to apply for a mandamus. It has always required that the applicant for a mandamus shall have a legal specific right to enforce the performance of those duties.[85]

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[83] Q.B.R., r. 556. We are not here concerned with an action for statutory mandamus (s. 58 of *The Queen's Bench Act*, C.C.S.M. c. C270, hereinafter noted as "Q.B.A.") which is a remedy for the enforcement of private rights, similar to the mandatory injunction. For a discussion of the distinction between the prerogative writ or order of mandamus and the action for statutory mandamus, *see e.g.*, *Smith* v. *The Chorley District Council*, [1897] 1 Q.B. 532; *Rich* v. *Melancthon Board of Health* (1912), 2 D.L.R. 866 (Ont. Div. Ct.); *Re Rowe and Harris* (1928), 63 O.L.R. 163 (App. Div.).

[84] (1963), 46 W.W.R. 202 (Man. Q.B.).

[85] *Id.*, at 206, quoting *Re Provincial Board of Health for Ontario and City of Toronto* (1920), 46 O.L.R. 587 at 596 (App. Div.), quoting (with minor inaccuracies) *The Queen* v. *The Guardians of the Lewisham Union*, [1897] 1 Q.B. 498 at 501.

The "legal specific right" test has been criticized for being tautological and ambiguous, capable of several interpretations.[86] As well, the cases often display a confusion between the issue of *locus standi* and the question of whether the duty in question is merely owed to the Crown and therefore not amenable to mandamus irrespective of the nature of the applicant.

2.66 In general, a liberalizing trend is evidenced by recent cases respecting mandamus.[87] It now appears that standing will be acknowledged if the applicant establishes a substantial interest in the performance of the duty, or demonstrates that his interests will be adversely affected, making the test virtually indistinguishable from the "person aggrieved" test applied in the case of other prerogative remedies.

(e) Discretion in granting mandamus

2.67 As with other extraordinary remedies, the granting of mandamus lies in the court's discretion. Common factors which may influence a court to refuse relief include unreasonable delay, unmeritorious conduct by the applicant, or failure to demonstrate that the remedy is necessary or useful. Relief will also generally be denied where there exists an alternative remedy which is not less convenient, beneficial and effective.[88]

3. Declaration

(a) Introduction

2.68 Declaration is a remedy in which a statement of legal right or status may be obtained, unaccompanied by any sanction directed against the defendant. Unlike the prerogative remedies, the declaration arose as a remedy in private law; at present, it serves an important function in both the private and public law spheres.

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[86] *See e.g.*, S.M. Thio, "*Locus Standi* in Relation to Mandamus", [1966] Pub. L. 133; S.M. Thio, *supra* n. 71; *de Smith*, *supra* n. 12, at 551.

[87] *Inland Revenue Commissioners* v. *National Federation of Self-Employed and Small Businesses Ltd.*, [1981] 2 W.L.R. 722 (H.L.); *National Indian Brotherhood* v. *Juneau (No. 1)*, [1971] F.C. 66 (T.D.); *Re District of North Vancouver and National Harbours Board* (1978), 89 D.L.R. (3d) 704 (F.C.T.D.); *Burke* v. *City of Winnipeg* (1982), 18 Man. R. (2d) 134 (Q.B.); *Re Hoddinott and Nickerson* (1983), 145 D.L.R. (3d) 368 (N.B.Q.B.).

[88] *C.P.R.* v. *District Registrar of Dauphin Land Titles Office* (1956), 4 D.L.R. (2d) 518 (Man. Q.B.).

2.69 Rule 8 of section 63 of *The Queen's Bench Act* provides:

> No action or proceeding is open to objection on the ground that a merely declaratory judgment or order is sought thereby; and the court may make binding declarations of right whether any consequential relief is or could be claimed or not.

2.70 The declaration has two roles. It may be used as an original remedy to declare a person's legal position under a statute or instrument. It may also be sought as a supervisory remedy to declare that an act or decision of an administrative authority is invalid. As observed in the English Law Commission's Working Paper,[89] the court sometimes grants declarations in both roles: where an administrative body acts without authority, the court may first declare the action invalid and then go on to declare the applicant's legal rights.

(b) Scope

2.71 Subject to certain circumstances which preclude the awarding of declaratory relief, the court exercises a broad discretion, not only with respect to the granting of relief on the particular facts of the case, but also with respect to the more basic question of whether the case is of a type in which declaratory relief is appropriate. Thus the scope of this remedy cannot be defined with exactitude:

> Declaratory relief is a remedy neither constrained by form nor bounded by substantive content, which avails persons sharing a legal relationship, in respect of which a "real issue" concerning the relative interests of each has been raised and falls to be determined.[90]

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[89] The Law Commission (England), *supra* n. 82.

[90] *Solosky* v. *The Queen* (1979), 50 C.C.C. (2d) 495 at 503 (S.C.C.).

As noted by Professor de Smith, "[f]lexibility is, indeed, the greatest merit of the declaratory judgment".[91]

2.72 Unlike certiorari and prohibition as traditionally circumscribed, the declaration is available to challenge the passage of subordinate legislation, and its availability has not been restricted by the judicial/administrative conundrum. As well, this remedy will lie to declare a decision of a domestic tribunal invalid.[92] A further advantage of the declaration is that it is available against the Crown.[93]

2.73 A declaration may be sought when an administrative body exceeds or abuses its jurisdiction, or violates the rules of natural justice. A major deficiency of the declaration, however, is that it apparently does not lie for intra-jurisdictional error of law on the face of the record.[94]

2.74 A declaratory action may only be brought against a suable entity.[95] In some cases, this rule may be circumvented by naming as

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[91] *de Smith*, *supra* n. 12, at 482.

[92] *Evaskow* v. *International Brotherhood of Boilermakers, & Iron Shipbuilders, Blacksmiths, Forgers and Helpers* (1969), 71 W.W.R. 565 (Man. C.A.); *Re Carnation Foods Co. Ltd. and Canadian Food & Allied Workers, Local 798* (1971), 23 D.L.R. (3d) 684 (Man. Q.B.), rev'd (1972) 28 D.L.R. (3d) 584 (Man. C.A.); D.J. Mullan, *supra* n. 12, §198.

[93] *The Proceedings Against the Crown Act*, C.C.S.M. c. P140, s. 17(1) to s. 17(4).

[94] *Punton* v. *Ministry of Pensions and National Insurance* (No. 2), [1964] 1 W.L.R. 226 (C.A.). *But cf. Board of Trustees of Edmonton Catholic School District No.* 7 v. *City of Edmonton* (1977), 75 D.L.R. (3d) 443 (Alta. S.C., T.D.).

[95] *Hollinger Bus Lines Limited* v. *Ontario Labour Relations Board*, [1952] O.R. 366 (C.A.); *"B"* v. *The Commission of Inquiry pertaining to the Department of Manpower and Immigration*, [1975] F.C. 602 (T.D.); *Lucas* v.

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defendants all members of the body which lacks legal personality, or by proceeding against the Crown. It would appear that it is unnecessary to establish that a body is a suable entity where declaratory relief is sought on motion rather than by action.[96]

(c) Procedure

2.75 Proceedings for a declaration may be instituted by a statement of claim, with the attendant benefits of discovery and full trial procedure. An action for a declaration may be combined with a claim for an injunction or a claim for damages. Because an order declaring the rights of parties must, it is said, by its nature be a final order, it is not possible to obtain a declaration on an interim basis.[97]

2.76 Declaratory proceedings also may be instituted by originating notice, where the rights of the applicant depend on the construction of any statute, by-law, deed, will or other instrument.[98] The courts generally have taken a

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(Footnote continued from page 39)
Taxicab Board (1984), 27 Man. R. (2d) 141 (Q.B.), aff'd (1985), 31 Man. R. (2d) 97 (C.A.). *But see Samuels* v. *Attorney-General for Canada* (1955), 1 D.L.R. (2d) 110 (Alta. S.C., App. Div.); *semble Malik* v. *Government of Manitoba* (1983), 27 Man. R. (2d) 190 (Q.B.).

[96] *Bingo Enterprises Ltd.* v. *Manitoba Lotteries and Gaming Licensing Board* (1983), 23 Man. R. (2d) 33 (C.A.).

[97] *Underhill* v. *Ministry of Food*, [1950] 1 All E.R. 591 (Ch. D.); *International General Electric Company of New York Ltd.* v. *Commissioners of Customs and Excise*, [1962] Ch. 784 (C.A.), described in the English Working Paper (*supra* n. 82, at 36) as "a singular example of the triumph of logic over justice"; *Shaw* v. *R. in Right of British Columbia*, [1982] 6 W.W.R. 718 (B.C.S.C.). *But see Gloucester Properties Ltd.* v. *R. in Right of British Columbia*, [1980] 6 W.W.R. 30 (B.C.S.C.); *Peralta* v. *Minister of Natural Resources of Ontario* (1984), 46 C.P.C. 218 (Ont. H.C.).

[98] Q.B.R., r. 536. For a broad interpretation of "rights" within the terms of rule 536, *see Re Swan River-The Pas Transfer Ltd. and Highway Traffic and Motor Transport Board* (1974), 51 D.L.R. (3d) 292 (Man. C.A.).

broad view of the circumstances in which declaratory relief may appropriately be sought on motion.[99] In a recent case,[100] the Manitoba Court of Appeal held that a motion for a declaration was appropriate to review a decision of the Manitoba Lotteries and Gaming Licensing Board to refuse to issue certain licenses. Relief was granted on the basis that the Board had exercised its discretion unreasonably. Since the construction of a statute was relevant only to the extent of determining the scope of the Board's powers, this case would appear to give wide latitude to the scope of motions for declaratory relief.[101]

(d) *Locus standi*

2.77 Traditionally, it has been for the Attorney-General, in his role as guardian of the public interest, to institute proceedings involving alleged violations of public rights. Included within the function of protecting the public interest is the Attorney-General's entitlement to institute proceedings where a public body exceeds, or threatens to exceed, its statutory powers.

2.78 The Attorney-General may proceed either *ex proprio motu* - acting on his own initiative - or *ex relatione*. In a relator action, the proceedings are brought in the name and on behalf of the state, but upon the information and instigation of a private individual, who is called the relator. The relator need have no particular personal interest in the subject matter of the proceedings.

2.79 The Attorney-General's consent is required for relator proceedings, and the granting or withholding of the requisite consent is within his absolute discretion.[102] In practice, once consent is granted, the proceedings are in general conducted by the relator.

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[99] *See e.g.*, *Re Zurbyk and Orloff* (1959), 28 W.W.R. 584 (Man. Q.B.); *Eckstein* v. *Law Society of Manitoba*, [1981] 3 W.W.R. 171 (Man. C.A.).

[100] *Bingo Enterprises Ltd.* v. *Manitoba Lotteries and Gaming Licensing Board*, *supra* n. 96.

[101] *But cf. Garry Finance Corporation Limited* v. *Registrar of Motor Vehicles* (1958), 66 Man. R. 377 (Q.B.) where the court questioned whether a motion under Q.B.R., r. 536 was appropriate to review the Registrar's refusal to release an impounded car.

2.80 The law concerning the standing of a private individual to institute proceedings for declaratory relief with respect to public rights, without obtaining the Attorney-General's consent to relator proceedings, is at present in a state of flux. The classic statement of the traditional approach is found in *Boyce* v. *Paddington Borough Council* where Buckley, J. said of the injunction:

> A plaintiff can sue without joining the Attorney-General in two cases: first, where the interference with the public right is such as that some private right of his is at the same time interfered with . . . and, secondly, where no private right is interfered with, but the plaintiff, in respect of his public right, suffers special damage peculiar to himself from the interference with the public right.[103]

In the first arm of the test, "private right" denotes a right, the invasion of which gives rise to an actionable wrong within the categories of private law (e.g., commission of a tort, breach of contract).[104] With respect to the second arm, an analysis of the cases suggests that the "special damage" (sometimes equated with "special interest") must be distinct from that sustained by the general public, whether the difference is one of kind or degree.[105]

2.81 This two-pronged test was adopted by the Ontario Court of Appeal in

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[102] *Cowan* v. *Canadian Broadcasting Corporation* (1966), 56 D.L.R. (2d) 578 (Ont. C.A.).

[103] [1903] 1 Ch. 109 at 114; rev'd [1903] 2 Ch. 556 (C.A.); rev'd [1906] A.C. 1 (H.L.).

[104] For a more expansive approach to "right" or "private right" of the plaintiff, *see* the discussion in T.A. Cromwell, *supra* n. 71, at 125-131.

[105] S.M. Thio, *supra* n. 71.

Cowan v. *C.B.C.*[106] as applicable to claims for declarations and injunctions. An obvious shortcoming of this test is that the more widespread and general the effects of the impugned legislation or administrative act, the less likely there is to be a plaintiff who can claim special injury.[107]

2.82 In 1908, the Supreme Court of Canada recognized another situation in which a private individual could bring suit, upholding the right of a municipal taxpayer to seek declaratory relief where an illegal expenditure was allegedly made by a municipal council.[108] The "ratepayers cases" have been recently reviewed by the Supreme Court with apparent approval, although the ostensible justification for allowing standing - that the ratepayer suffers special damage in the form of increased taxes - was characterized as "unreal".[109]

2.83 A further development in the law of standing has arisen recently from a series of cases involving challenges to the constitutionality of legislation. In *Thorson* v. *Attorney-General of Canada (No. 2)*,[110] the plaintiff brought an action on his own behalf as a taxpayer of Canada, and also on behalf of other taxpayers of Canada, seeking declarations respecting the constitutional validity of the federal *Official Languages Act*. The question of his standing was raised: the plaintiff suffered no peculiar damage nor did he suffer any actionable wrong in private law.

2.84 The plaintiff previously had asked the Attorney-General to act in his public capacity to challenge the constitutionality of the statute; the

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[106] *Supra* n. 102.

[107] *See e.g.*, *Smith* v. *The Attorney General of Ontario*, [1924] S.C.R. 331, involving declaratory proceedings respecting the validity of temperance legislation, where the plaintiff failed to show that he was "exceptionally prejudiced", having no interest beyond that of "hundreds of other citizens".

[108] *MacIlreith* v. *Hart* (1908), 39 S.C.R. 657.

[109] *Thorson* v. *Attorney-General of Canada (No. 2)*, *supra* n. 72, at 19. It is arguable that standing in ratepayers' actions now rests on a right of ratepayers to *intra vires* behaviour by their local governments.

[110] *Supra* n. 72.

Attorney-General had declined. That refusal, coupled with the directory nature of the legislation which affected all members of the public alike, meant that, under the traditional tests, no one could come forth to challenge the legislation. This consideration weighed heavily with Laskin J. (as he then was) who viewed the prospect of immunizing this justiciable issue[111] from judicial review as "strange and, indeed, alarming".[112]

2.85 The majority held that standing in taxpayers' actions was a matter for the Court's discretion, and in *Thorson* exercised that discretion to allow the plaintiff to proceed with his suit:

> . . . [W]here all members of the public are affected alike, as in the present case, and there is a justiciable issue respecting the validity of legislation, the Court must be able to say that as between allowing a taxpayers' action and denying any standing at all when the Attorney-General refuses to act, it may choose to hear the case on the merits.[113]

This discretionary approach to standing has been confirmed subsequently in numerous cases involving challenges to the validity of federal and provincial legislation.[114] In *The Minister of Justice of Canada* v. *Borowski*, a majority of the Supreme Court of Canada summarized the law as follows:

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[111] A justiciable issue may be defined as one which raises real and substantial questions which are appropriate for judicial determination. The distinction between *locus standi* and justiciability has been drawn as follows: ". . . [s]tanding goes to whether *this* applicant should be entitled to apply to the court for relief while justiciability goes to whether *any* applicant should be so entitled" (P. Cane, "The Function of Standing Rules in Administrative Law", [1980] Pub. L. 303 at 310).

[112] *Supra* n. 72, at 7.

[113] *Supra* n. 72, at 18.

[114] *See e.g.*, *Nova Scotia Board of Censors* v. *McNeil* (1975), 55 D.L.R. (3d) 632 (S.C.C.); *The Minister of Justice of Canada* v. *Borowski*, [1981] 2 S.C.R. 575; *Dybikowski and British Columbia Civil Liberties Association* v. *R. in Right of British Columbia*, [1979] 2 W.W.R. 631 (B.C.S.C.); *Forest* v. *Attorney General of Manitoba*, [1979] 4 W.W.R. 229 (Man. C.A.), aff'd [1980]

(Footnote continued to page 45)

> . . . [T]o establish status as a plaintiff in a suit seeking a declaration that legislation is invalid, if there is a serious issue as to its invalidity, a person need only to show that he is affected by it directly or that he has a genuine interest as a citizen in the validity of the legislation and that there is no other reasonable and effective manner in which the issue may be brought before the Court.[115]

2.86 Some Canadian courts have taken a restricted view of the *Thorson* line of cases, confining their scope to constitutional challenges to legislation.[116] Others, including the Manitoba Court of Appeal, have afforded *Thorson* a broader application, extending its principles to the

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(Footnote continued from page 44)
2 W.W.R. 758 (S.C.C.). *See also Re University of Manitoba Students' Union Inc. and Attorney-General of Manitoba* (1979), 101 D.L.R. (3d) 390 (Man. Q.B.); *Re Saskatoon Criminal Defence Lawyers Association and Government of Saskatchewan* (1984), 11 D.L.R. (4th) 239 (Sask. Q.B.). Note that the latter two cases did not involve challenges to the constitutionality of primary legislation but rather raised the issue of whether the subordinate legislation in question was *ultra vires* (an issue which could be characterized as one of administrative, not constitutional, law; *but cf. Waddell* v. *Governor in Council*, [1981] 5 W.W.R. 662 (B.C.S.C.), aff'd [1983] 1 W.W.R. 762 (B.C.C.A.)). This distinction, however, appeared to be of no relevance to the question of standing in these cases.

[115] *Id.*, at 598.

[116] *Rosenberg* v. *Grand River Conservation Authority* (1976), 69 D.L.R. (3d) 384 (Ont. C.A.); *Islands Protection Society* v. *R. in Right of British Columbia*, [1979] 4 W.W.R. 1 (B.C.S.C.); *Re Greenpeace Foundation of British Columbia and Minister of the Environment* (1981), 122 D.L.R. (3d) 179 (B.C.S.C.); *Re Village Bay Preservation Society and Mayne Airfield Inc.* (1982), 136 D.L.R. (3d) 729 (B.C.S.C.); *Re Saanich Inlet Preservation Society and Cowichan Valley Regional District* (1983), 147 D.L.R. (3d) 174 (B.C.C.A.); *Carruthers* v. *Langley* (1984), 13 D.L.R. (4th) 528 (B.C.S.C.), aff'd (1985), 23 D.L.R. (4th) 623 (B.C.C.A.); *Re Mueller and St. Vital School Division No. 6* (1985), 22 D.L.R. (4th) 453 (Man. Q.B.).

administrative law realm.[117] In *Stein* v. *City of Winnipeg*,[118] the plaintiff sought a declaration and an injunction restraining the defendant municipality from proceeding with its programme of insecticide spraying. The Court noted that the relevant legislation was designed to protect the environment and revealed an express intention to encourage citizen participation. By analogy with *Thorson*, the Court held that a resident had standing to challenge the municipality's intended course of action, and that participation by the Attorney-General was not required.

2.87 In view of the conflicting judgments in various jurisdictions, the precise scope and impact of the *Thorson* principles with respect to actions for declarations in the administrative law field await further clarification.[118A] Nevertheless, to summarize the *apparent* present common law position respecting standing in declaratory proceedings in Manitoba in relation to public rights, an individual has standing without joining the Attorney-General if:

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[117] *See e.g.*, *Carota* v. *Jamieson*, [1977] 1 F.C. 19 (T.D.); *Fraser* v. *Town of New Glasgow* (1976), 76 D.L.R. (3d) 79 (N.S.S.C., T.D.); *Finlay* v. *Minister of Finance of Canada* (1983), 146 D.L.R. (3d) 704 (F.C.A.), leave to appeal to the Supreme Court of Canada granted September 22, 1983; *Re Energy Probe and Atomic Energy Control Board* (1984), 8 D.L.R. (4th) 735 (F.C., T.D.), aff'd (1984), 15 D.L.R. (4th) 48 (F.C.A.); *Re University of Manitoba Students' Union Inc.* and *Attorney-General of Manitoba*, *supra* n. 114; *Re Saskatoon Criminal Defence Lawyers Association* and *Government of Saskatchewan*, *supra* n. 114. *See also* D.J. Mullan, "The Declaratory Judgment: Its Place as an Administrative Law Remedy in Nova Scotia" (1975), 2 Dalhousie L.J. 91 at 107, where it is suggested that "an extension of the *Thorson* approach to an administrative law context would not be out of place."

[118] (1974), 48 D.L.R. (3d) 223 (Man. C.A.).

[118A] Since the writing of this Report, the Supreme Court of Canada, on December 18, 1986, released its decision in *The Minister of Finance of Canada* v. *Finlay* (on appeal from the Federal Court of Appeal, *supra* n. 117). The Supreme Court therein confirmed that the discretionary approach to public interest standing developed in the context of challenges to the constitutionality of legislation should be extended to actions for declaratory or injunctive relief involving challenges to the legality of administrative action.

a) the plaintiff can establish interference with a private right of his or special damage peculiar to himself from the interference with the public right; or

b) the plaintiff is a ratepayer challenging allegedly illegal municipal expenditure; or

c) the plaintiff is challenging the constitutionality of legislation or the legality of administrative action, and the court in its discretion allows the plaintiff to continue his action, having regard to several factors, including the following:

    i) the justiciability of the issue;[119]
    ii) the nature of the challenged legislation or of the legislation governing the impugned administrative act;
    iii) the seriousness of the questions raised;
    iv) the existence of another reasonable and effective way to bring the matter before the courts for review; and
    v) the degree to which the plaintiff is directly affected by, or has a genuine interest as a citizen in, the subject matter.

(e) Discretion in granting declarations

2.88 Frequently-cited factors which may influence a court to exercise its discretion to refuse to grant a declaration include undue delay in seeking the remedy, failure to demonstrate that a useful purpose would be served by granting it, and apprehension of serious public inconvenience resulting from a granting of the remedy. The court may also refuse relief where the issue involves a merely hypothetical or academic question.

2.89 There is some judicial support for the proposition that a declaration cannot be granted in circumstances where one of the prerogative remedies is available.[120] Courts in Manitoba, however, have not accepted prerogative remedies and the declaration as mutually exclusive; the choice of remedy is a matter of discretion. Where certiorari is available, but would not afford a complete remedy, declaratory relief may be granted as a more convenient and flexible remedy.[121] The availability of a declaration as an alternative to mandamus also has been recently confirmed.[122]

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[119] *Quaere* whether it is desirable to intertwine the issues of standing and justiciability. Where an issue is not justiciable, it would seem preferable to dismiss the action on that basis, rather than on the basis of the plaintiff's personal status.

4. Injunction

(a) Introduction

2.90 In origin, the injunction was a private law equitable remedy, developed by the Court of Chancery and used to prevent the commission or continuation of unlawful acts or activity. Today it remains primarily a remedy in private law; however, it has also emerged as an important tool for preventing unauthorized action by governmental and other public bodies.

2.91 An injunction may be either prohibitory or mandatory in nature. If prohibitory, it will issue to restrain the administrative authority from engaging in *ultra vires* activity. The mandatory injunction, which commands the performance of a legal obligation, is relatively rare in public law. It is likely to issue only if the relevant statute is interpreted as conferring upon the plaintiff a private right of action. Generally, the more appropriate remedy for compelling the performance of a public duty is the prerogative order of mandamus.

2.92 An important feature of the injunction is its flexibility. A final injunction may be expressed to have perpetual effect; it may be awarded for a fixed period, or for an indefinite period terminating at such time as the defendant complies with certain conditions; or its operation may be suspended for a period of time during which the defendant is given the opportunity to prepare to desist from his unlawful activity. Also, an interlocutory or interim injunction may be granted before trial, for the purpose of preserving the *status quo* pending final determination of the case on its merits.

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[120] *Hollinger Bus Lines Limited* v. *Ontario Labour Relations Board*, *supra* n. 95.

[121] *Klymchuk* v. *Cowan* (1964), 47 W.W.R. 467 (Man. Q.B.); *Malik* v. *Government of Manitoba*, *supra* n. 95.

[122] *Bingo Enterprises Ltd.* v. *Manitoba Lotteries and Gaming Licensing Board*, *supra* n. 96.

(b) Scope

2.93 The injunction is available against both statutory authorities and domestic tribunals to restrain unlawful activity. It is necessary, however, for the defendant to be a suable entity.[123]

2.94 At common law, it is generally accepted that an injunction will not issue against the Crown.[124] The common law position with respect to Crown servants and agents is less clear.[125] However, stated simply, in Canada it would appear generally that Crown immunity extends to servants and agents only when they are acting within their authority; if they commit or threaten to commit an act which lies outside the scope of their lawful powers, it is within the court's jurisdiction to issue a restraining order against them.[126]

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[123] *Hollinger Bus Lines Limited* v. *Ontario Labour Relations Board*, *supra* n. 95.

[124] *But see Carlic* v. *The Queen and Minister of Manpower and Immigration*, *supra* n. 65, where an interim injunction was awarded against the defendants, including the Crown. The Court recognized the general principle that the Sovereign should not be enjoined, but noted that the principle was based on the practical problem of enforcing such an order. The Court thought it unlikely that the defendants would disobey the order, but stated that if they did so, enforcement proceedings could be brought against the defendants other than the Crown. *See Jaundoo* v. *Attorney-General of Guyana*, [1971] A.C. 972 (P.C.), where the Privy Council criticized the inclusion of the Crown amongst the defendants subject to the interim injunction in the *Carlic* case.

[125] For a more in-depth look at this complex issue, *see* Law Reform Commission of British Columbia, *supra* n. 82, at 25-27; B.L. Strayer, "Injunctions Against Crown Officers" (1964), 42 Can. Bar Rev. 1; R.J. Sharpe, *Injunctions and Specific Performance* (1983) 167 *et seq*.

[126] *Rattenbury* v. *Land Settlement Board*, [1929] S.C.R. 52; *Le Conseil des Ports Nationaux* v. *Langelier*, [1969] S.C.R. 60; *Carlic* v. *The Queen and Minister of Manpower and Immigration*, *supra* n. 65. *See also* the

(Footnote continued to page 50)

2.95 Provisions relating to the availability of injunctions against the Crown and Crown officers now appear in the legislation of all Canadian provinces.[127] In Manitoba, subsection 17(2) of *The Proceedings Against the Crown Act*[128] reaffirms the Crown's common law immunity from injunctive relief, and provides that a declaration may be granted in lieu of an injunction. With respect to Crown servants, subsection 17(4) states:

> The court shall not in any proceedings grant an injunction or make an order against an officer of the Crown if the effect of granting the injunction or making the order would be to give any relief against the Crown that could not have been obtained in proceedings against the Crown, but may, in lieu thereof, make an order declaratory of the rights of the parties.

The import of this latter provision is less than clear. Most commentators suggest that the corresponding English provision takes away any possibility which may have existed at common law of obtaining an injunction against Crown servants acting in their capacity as such.[129] Canadian authority, however, indicates that the immunity provided by such a legislative provision may be less far-reaching. In *MacLean* v. *Liquor Licence Board of Ontario*,[130]

(Footnote continued from page 49)
comments in *MacLean* v. *Liquor Licence Board of Ontario* (1975), 61 D.L.R. (3d) 237 (Ont. Div. Ct.).

[127] The legislation in common law jurisdictions is based on the *Crown Proceedings Act, 1947*, 10 & 11 Geo. 6, c. 44, s. 21 (U.K.) and the *Uniform Proceedings against the Crown Act*, Proceedings of Conference of Commissioners on Uniformity of Legislation in Canada (1950). In Quebec, *see* the *Code of Civil Procedure*, L.R.Q. 1977, c. C-25, art. 94.2 and art. 100.

[128] *The Proceedings Against the Crown Act*, C.C.S.M. c. P140. *Quaere* if the provisions of this Act which recognize the immunity of the Crown and its servants from injunctive relief offend section 15 of the *Canadian Charter of Rights and Freedoms*.

[129] H. Street, *Governmental Liability* (1953) 141; B.L. Strayer, *supra* n. 125. *See also* The Law Commission (England), *supra* n. 82.

[130] *Supra* n. 126.

the Court suggested that the legislation merely preserves the common law principles, and that, accordingly, an injunction is available to restrain *ultra vires* activities of Crown servants. The Court further stated, in the alternative, that

> . . . even if [the section precluding injunctions against Crown servants] is applicable in the case where the Crown servant whose authority is questioned is the designated official to carry out some policy of the Crown, it surely cannot apply where a minor civil servant is officiously abusing his apparent powers.[131]

2.96 R.J. Sharpe has put forward the argument for a narrow interpretation of the section as follows:

> It would be odd if legislation designed to facilitate redress against the Crown and to put the Crown on the same basis as other litigants should be read so as to significantly curtail individual rights recognized prior to the legislation. The provision dealing with Crown servants may, it is submitted, be taken merely to restate the common law position and leave untrammelled the power of the courts to restrain illegal acts by State officials. The distinction between injunctions against the Crown and injunctions against Crown servants exceeding their powers has long been recognized. The subsection excludes injunctive relief only where the effect of the injunction against a Crown servant would be to give an injunction against the Crown. Injunctions against Crown servants exceeding their powers have never been considered to amount to injunctions against the Crown, and the legislation should be read in light of this basic distinction.[132]

While the reasoning of the Court in *MacLean* and the argument put forward by Sharpe may be appealing, the scarcity of authority on this subject leaves uncertain the exact scope of the legislative provisions which preclude the awarding of injunctions against officers of the Crown.

2.97 In general, a declaration in lieu of a permanent injunction will provide effective relief against the Crown or its servants; there is little danger of such an order being disregarded. The substitution of declaratory for injunctive relief, however, has one major weakness: the courts have held that there is no such "animal" as an interim declaration.[133] The result is that interim relief cannot be obtained against the Crown or against those Crown officers who are immune from injunctive relief.

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[131] *Supra* n. 126, at 250.

[132] R.J. Sharpe, *supra* n. 125, at 175-176.

(c) Procedure

2.98 Injunctive relief is sought by way of action, and may be conjoined with a request for a declaration or damages. As in other proceedings commenced by statement of claim, discovery and full trial procedure are available.

(d) *Locus standi*

2.99 The development of the rules of standing for the injunction has closely paralleled that relating to declaratory relief.[134] As with the declaration, the traditional requirement has been that the plaintiff demonstrate that a private right of his has been infringed or that he has suffered special damage from the interference with a public right.[135]

2.100 The impact of the *Thorson* line of cases on standing to seek injunctive relief is unclear. Some cases have extended the discretionary approach to standing to the injunction, while others have maintained a steadfast adherence to the traditional standing requirements for this remedy.[136]

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[133] *See* the cases previously noted in footnote 97.

[134] *See* the principles discussed earlier in §§2.80-2.87 of this Chapter.

[135] *Cowan* v. *Canadian Broadcasting Corporation*, *supra* n. 102.

[136] *Compare Stein* v. *City of Winnipeg*, *supra* n. 118 and *Carota* v. *Jamieson*, *supra* n. 117 *with Re Greenpeace Foundation of British Columbia and Minister of the Environment*, *supra* n. 116 and *Bancroft* v. *Governing Council of the University of Toronto* (1986), 53 O.R. (2d) 460 (Ont. H.C.).

But see The Minister of Finance of Canada v. *Finlay* (S.C.C.), *supra* n. 118A, which has recently resolved this controversy in favour of extending the discretionary public interest test of standing to injunctions sought in the administrative law context.

(e) Discretion in granting injunctions

2.101 As in declaratory proceedings, an action for an injunction may be dismissed in the court's discretion on the grounds of undue delay, acquiescence, or bad faith on the part of the plaintiff. In addition, the existence of an alternative effective remedy may result in an exercise of discretion to refuse injunctive relief.[137]

2.102 There is some question as to whether an injunction may be issued in circumstances where the remedy of prohibition is available. ***Hollinger Bus Lines Limited*** v. ***Ontario Labour Relations Board***[138] is authority for the proposition that injunctive relief is not available in such a case. The Saskatchewan Court of Appeal, however, emphatically rejected ***Hollinger***, and held that the decision to grant an injunction in situations where prerogative relief would also be available is a matter of discretion:

> The adoption, in this day, of the strict approach would signal an unbending and blind adherence to tradition, labels and form with little heed to the changing needs of society, to merit and substance. . . . ***Hollinger*** is no longer precedential or persuasive authority in any province for the proposition that injunctive relief is not available where certiorari or prohibition lies.[139]

However, the Manitoba Court of Appeal has recently applied ***Hollinger***, holding that an injunction is not an alternative to prerogative relief.[140]

5. Quo Warranto

(a) Introduction

2.103 Quo warranto ("by what authority?") was originally a prerogative writ which the Crown could use to inquire into the title to any office or franchise claimed by a subject. In the sixteenth century, it was replaced by the information in the nature of quo warranto.

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[137] ***See e.g.***, ***Re Chapman*** (1980), 7 Man. R. (2d) 235 (C.A.).

[138] ***Supra*** n. 95.

[139] ***Regina (City)*** v. ***Regina City Policemen's Association***, [1982] 1 W.W.R. 759 at 763-764 (Sask. C.A.).

[140] ***Bingo Enterprises Ltd.*** v. ***Manitoba Lotteries and Gaming Licensing Board***, ***supra*** n. 96.

2.104 In Manitoba, this seldom-sought remedy is, at present, governed by sections 96 to 98 of *The Queen's Bench Act*. The substantive law which developed in relation to the information in the nature of quo warranto still applies.

(b) Scope

2.105 Quo warranto is used to ascertain a person's entitlement to a public office which he purports to occupy and exercise. The office may be one created by royal charter, royal prerogative or statute, but it must be of a public and substantive nature. Quo warranto does not lie, however, to challenge the right of a member of the provincial legislative assembly to hold his seat.[141]

2.106 A person's entitlement to hold office is normally challenged on the basis that he lacks the statutory qualifications for the position or that he has lost those qualifications during his term in office. There is some question regarding the appropriateness of quo warranto where the legality or constitutionality of the office itself, rather than the qualification of the particular office-holder, is challenged.[142] Quo warranto does not extend to a situation where the manner in which an office-holder exercises his power, rather than his right to hold office, is being challenged.[143]

2.107 Ordinarily, a person must actually occupy and act in the office before quo warranto proceedings are available. However, there have been cases where the remedy was granted after a person had merely signified formal acceptance of the position and asserted his claim thereto.[144].

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[141] *R. ex rel. Tolfree* v. *Clark*, [1943] O.R. 501 (C.A.); *R. ex rel. Stubbs* v. *Steinkopf* (1964), 47 D.L.R. (2d) 105 (Man. Q.B.), rev'd on other grounds 48 D.L.R. (2d) 671 (Man. C.A.).

[142] *Compare R. ex rel. McPhee* v. *Sargent* (1967), 64 D.L.R. (2d) 153 (B.C.C.A.) *with R. ex rel. Shaw* v. *Trainor* (1967), 66 D.L.R. (2d) 605 (P.E.I.S.C.).

[143] *Bruce* v. *Reynett*, [1979] 2 F.C. 697 (T.D.).

(c) Procedure

2.108 In accordance with *The Queen's Bench Act*, proceedings for relief in the nature of quo warranto are commenced by notice of motion. The court may, however, direct an issue for the trial of the matters in question.

2.109 In order to shield officers from harassment and prevent abuse by disappointed candidates, the requirement of leave to file an information was introduced in the late seventeenth century. Leave is still required in some provinces, but it is no longer the practice to seek leave in Manitoba.[145] However, subsection 96(2) of *The Queen's Bench Act* does require an applicant to give security prior to serving a notice of motion for quo warranto.

(d) *Locus standi*

2.110 Courts have generally been generous with respect to the issue of standing to institute proceedings. The usual requirement is that the applicant, called "the relator", must be interested or "substantially interested"[146] and must be seeking the remedy in good faith; special damage need not be demonstrated. Usually, an applicant who is subject to the jurisdiction of the challenged office-holder will be regarded as having a sufficient interest.[147]

2.111 The Attorney-General has standing to institute proceedings *ex officio*.

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[144] *See e.g.*, *R.* v. *Bean*, [1934] 2 D.L.R. 705 (N.B.S.C., App. Div.).

[145] *R. ex rel. Luxford* v. *Graham* (1959), 29 W.W.R. 654 (Man. Q.B.).

[146] *R. ex rel. Matheson* v. *Huber*, [1924] 2 D.L.R. 905 (Man. K.B.).

[147] *R. ex rel. Stamford TP.* v. *McKeown*, [1934] 4 D.L.R. 644 (Ont. S.C.), aff'd [1935] 2 D.L.R. 157 (Ont. C.A.).

(e) Discretion in granting quo warranto

2.112 The awarding of quo warranto is discretionary, and it may be refused on grounds of delay, acquiescence, bad faith or improper motives on the part of the applicant, or because the granting of the remedy would be contrary to the public interest. It may also be refused where there exists an equally effective and adequate alternative remedy.[148] In Manitoba, this latter principle is augmented by section 98 of *The Queen's Bench Act*, which provides that an application for quo warranto cannot be made where a specific statutory remedy exists.[149]

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[148] *R. ex rel. Hennigar* v. *Stevens* (1969), 3 D.L.R. (3d) 668 (N.S.S.C.).

[149] *R. ex rel. Luxford* v. *Graham*, *supra* n. 145. *See also Re St. Vital Municipal Election (No. 2.)* (1912), 3 D.L.R. 350 (Man. C.A.). For examples of specific statutory remedies, *see The Municipal Act*, C.C.S.M. c. M225, s. 66 *et seq.*; *The Local Authorities Election Act*, C.C.S.M. c. L180, s. 151 *et seq.*

CHAPTER 3

DEFICIENCIES OF THE PRESENT LAW

3.01 The present law of judicial review is governed by a pluralistic system of remedies -

> . . . remedies which overlap but do not coincide, which must be sought in wholly distinct forms of proceedings, which are overlaid with technicalities and fine distinctions, but which would conjointly cover a very substantial area of the existing field of judicial control. This state of affairs bears a striking resemblance to that which obtained when English civil procedure was still bedevilled by the old forms of action.[1]

The emphasis is on procedures and remedies; to a large degree, the substantive law has developed as an adjunct to the forms of relief. An unfortunate consequence of this remedy-oriented approach is that the merits of a case are sometimes overshadowed by issues of procedure, although the courts must be credited for their frequent attempts to prevent procedural technicalities from standing in the way of a determination on the merits. The present system begins with the question "Is this an appropriate case for (for example) certiorari proceedings?" rather than "Has the applicant established the illegality of a reviewable administrative act and, if so, what relief is appropriate?" This focus on the remedy sought, instead of on the substance of the grievance, constitutes a fundamental defect in the underlying structure of our present system of judicial review.

3.02 Not only is the system improperly focused; it is needlessly complex. The forms of relief are encrusted with technicalities created by history rather than dictated by reason. The complexities and distinctions bedevilling our present pluralistic system of remedies include the following:

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[1] The Law Commission (England), "Remedies in Administrative Law" (Working Paper No. 40, 1971) 55, quoting *Report of the Committee on Administrative Tribunals and Enquiries* (1957 Cmnd. 218), Minutes of Evidence, Appendix I, at 10, per Prof. S.A. de Smith.

1. The rules of *locus standi* vary from remedy to remedy, with the standing requirements for injunctive and declaratory relief being traditionally the most stringent. In addition, the rules for each individual remedy suffer from a lack of certainty and consistency in their formulation. There is, however, a trend in the common law toward a more liberal, discretionary approach to standing which is eroding, to some degree, the differences in *locus standi* requirements among the remedies.

2. Certiorari and prohibition have in recent tradition been available only to challenge those functions characterized as judicial or quasi-judicial. Now these remedies have been extended as applicable to administrative functions where the basis of review is a breach of the duty of procedural fairness. The availability of injunction, declaration and mandamus is not dependent upon the judicial/administrative classification.

3. While certiorari will issue to quash a decision where there is a non-jurisdictional error of law on the face of the record, there is some doubt as to whether a declaration is available on this ground.

4. There is some support for the proposition that a declaration or injunction will not be granted in circumstances where a prerogative remedy is available. However, the declaration is now emerging as an acceptable alternative to the prerogative remedies in some cases, whereas, in Manitoba at least, the injunction appears to remain unavailable in circumstances where prohibition could be granted.

5. The prerogative forms of relief are generally available only against bodies which derive their powers from statute. The injunction and declaration are appropriate to challenge the actions of both statutory and domestic bodies.

6. An injunction will issue only against a suable entity. This may also be true of the declaration when sought in an action. The prerogative remedies will issue against entities which do not have the capacity to be sued.

7. A declaration may be sought in proceedings against the Crown. Injunctive relief is not available against the Crown nor, generally, is prerogative relief available.

8. Prerogative relief is sought by originating notice of motion. An injunction and a declaration are sought by way of action commenced by statement of claim, although Queen's Bench Rule 536 allows for declaratory proceedings by way of originating notice in some circumstances. Both motions and actions have their own distinct procedure. Only the latter offers a full range of discovery proceedings.

9. Damages may be sought in conjunction with declaratory or injunctive, but not prerogative, relief.

10. There is no such remedy as an interim declaration. As a result, interim relief generally cannot be obtained against the Crown or against those Crown officers who share its immunity from injunctive relief.

3.03 In the Commission's view, these distinctions and limitations can, at times, hinder the operation of the present system of judicial review. Each remedy has advantages and disadvantages compared to the others, and it is often difficult to predict which of them is most appropriate in a particular case. Because the prerogative remedies are sought by a different procedure than the injunction and the declaration, they cannot be readily sought in the alternative. The litigant is thus faced with a difficult choice, and may lose his case on procedural grounds should he choose incorrectly.

3.04 Finally, to the extent that simplicity and rationality are viewed as laudable qualities in a legal system, the present scheme of judicial review falls short of being satisfactory.

CHAPTER 4

REFORM IN OTHER JURISDICTIONS

4.01 Over the past fifteen years in particular, reform of the law of judicial review in relation to administrative action has received the consideration of law reform agencies, legislatures and legal commentators throughout the Commonwealth. While there has been a virtual unanimous consensus that reform of the common law is desirable, opinion has been divided respecting the appropriate form and extent of such change. Generally, three approaches to reforming the law have been elsewhere adopted:

(a) assimilation of proceedings for the prerogative remedies with ordinary civil proceedings;

(b) introduction of a single application for obtaining the relief available under the existing judicial review remedies; and

(c) restructuring of the traditional forms of relief into a new statutory remedy.

These options will each be examined and their relative merits considered.

A. ASSIMILATION WITH CIVIL PROCEEDINGS

4.02 In several jurisdictions,[1] procedural reform of the judicial review remedies has been implemented as part of a revision of the rules of civil procedure. In New Brunswick, for example, orders in the nature of the prerogative remedies are now available by way of application for judicial review.[2] The injunction and declaration may still be sought by action, but in several circumstances, including generally the situation where there is no substantial dispute of fact, these remedies may also be sought by application.[3] On the hearing of an application, the court may direct that the application proceed to trial or direct the trial of a particular issue where there arises a substantial dispute of fact.[4] In addition, the Rules provide that if the wrong procedure is used to commence proceedings, the court must allow the amendments necessary to secure a determination of the matter, rather than set aside the proceedings.[5]

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[1] New South Wales, *Supreme Court Act, 1970* and *Rules of the Supreme Court* made thereunder; Nova Scotia, *Civil Procedure Rules*, effective March 1, 1972 (hereinafter noted as "NS"); New Brunswick, *Rules of Court*, effective April 1, 1982 (hereinafter noted as "NB"). *See also* The Law Reform Commission of Western Australia, *Report on Judicial Review of Administrative Decisions: Procedural Aspects and the Right to Reasons* (Project No. 26 - Part II, 1986) wherein the Commission recommends that relief in the nature of certiorari, prohibition, mandamus and quo warranto be obtainable in an ordinary civil proceeding commenced either by a writ of summons (action) or an originating motion. An injunction or declaration could also be sought in such a proceeding, whether commenced by writ or motion.

4.03 Even more flexible are the Rules adopted in Nova Scotia. Proceedings for all judicial review remedies (as well as damages[6]) may be instituted either by action or by application, the latter being the appropriate procedure where the principal issue involves a question of law or the construction of a document and where there is unlikely to be any substantial dispute of fact.[7] Therefore, the choice of procedure is governed by the requirements of the particular case, rather than by the nature of the remedy.[8] This also allows for the various forms of relief to be sought together or in the alternative in one proceeding.[9] Rule 2.01(3) provides that a proceeding must not be set aside on the ground that the wrong initiating procedure was chosen. The court is also specifically empowered to order a proceeding brought by application to be continued as an action.[10] Provisions respecting discovery apply to both actions and applications,[11] and the rules relating to the methods of adducing evidence are broad and versatile.[12]

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[2] NB, Rule 69.

[3] NB, Rule 16.03 and Rule 16.04, esp. 16.04(e), 16.04(i) and 16.04(j).

[4] NB, Rule 38.09.

[5] NB, Rule 2.02.

[6] NS, Rule 33.01(1) (as amended 12/12/74) refers to the award and assessment of damages on a trial (action) or hearing (application).

[7] NS, Rules 9.01, 9.02, 9.04 and 56.02. The Rules, however, are not without ambiguity. It should be noted that the definition of "originating notice" in Rule 1.05(1)(s) appears to be too narrow, and that throughout the Rules the term is used in relation to both actions and applications except where qualified as in "originating notice (action)" or "originating notice (application inter partes)". As well, a narrow interpretation of Rule 56 may lead one to conclude that the prerogative remedies are available only by way of application (in support of this view, *see* D.J. Mullan, "The Declaratory Judgment: Its Place as an Administrative Law Remedy in Nova Scotia" (1975), 2 Dalhousie L.J. 91). A wider interpretation, expressed in the text of this Report, relies on the unqualified use of "originating notice" in Rule 56, and is supported by *Heritage Trust of Nova Scotia v. Provincial Planning Appeal Board* (1981), 50 N.S.R. (2d) 352 (S.C., T.D.).

4.04 This approach to reform does much to overcome the difficulties and uncertainties attending the traditional procedures for judicial review. Since all forms of relief can be sought together in one proceeding, the applicant need not choose between the remedies at the risk of having the claim dismissed should he choose incorrectly; all potentially appropriate remedies can be requested in the alternative. As well, the form of proceeding can be used which best suits the requirements of the particular case. Where appropriate, the matter would be dealt with by the summary application procedure, but where complicated evidence or an issue of credibility is involved, the trial-type procedure would be available. Finally, the most significant advantage of approaching the reform of judicial review remedies through the revision and utilization of the ordinary rules of civil procedure is that the difficult task of defining in an enactment the scope of administrative or public law matters is avoided.

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[8] *See Medlee Ltd.* v. *Jemco Holdings Ltd.* (1975), 14 N.S.R. (2d) 666 (S.C., T.D.), aff'd 14 N.S.R. (2d) 662 (S.C., App. Div.); *Heritage Trust of Nova Scotia* v. *Provincial Planning Appeal Board*, *ibid.*

[9] *See e.g.*, *Lord Nelson Hotel Ltd.* v. *City of Halifax* (1972), 33 D.L.R. (3d) 98 (N.S.S.C., App. Div.); *Dombrowski* v. *Dalhousie University* (1976), 15 N.S.R. (2d) 299 (S.C., App. Div.).

[10] NS, Rule 37.10(e).

[11] NS, Rule 18 (examination for discovery), Rule 19 (interrogatories) and Rule 20 (discovery and inspection of documents).

[12] NS, Rule 31 (actions); Rule 37.09 (applications).

4.05 However, this approach to reform is entirely procedural and perhaps its major shortcoming is that it does nothing to simplify many of the technicalities which govern entitlement to the individual remedies. Furthermore, any substantive reforms are simply *ultra vires* the rule-promulgating authority. Reform respecting such matters as the rules of standing,[13] the constitution of the record for purposes of determining what material may be examined for non-jurisdictional error[14] and the availability of relief against the Crown would have to be implemented by primary legislation.

B. A SINGLE APPLICATION FOR THE JUDICIAL REVIEW REMEDIES

4.06 This approach to reform was pioneered in Ontario with the passage of the *Judicial Review Procedure Act*,[15] following the report of the Royal

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[13] For the position that the law of *locus standi* is substantive, *see* C. Harlow, "Comment", [1978] Pub. L. 1; H.W.R. Wade, "The Judicial Review Procedure Act - Comment" in *Proceedings of the Administrative Law Conference, University of British Columbia* (1979) 164; *de Smith's Judicial Review of Administrative Action* (4th ed. J.M. Evans 1980) 568. For support that standing is arguably substantive, *see*, P. Elias, "Remedies in Administrative Law - A Less than Modest Reform" (1978), 37 Camb. L.J. 205; J. Beatson and M.H. Matthews, "Supreme Court Rules - Reform of Administrative Law Remedies: The First Step" (1978), 41 Mod. L. Rev. 437; H. Markson, "Applying for Judicial Review: Practical Points - II", [1978] Solic. J. 517; P. Cane, "The Function of Standing Rules in Administrative Law", [1980] Pub. L. 303. For the position that the law of *locus standi* is a matter of practice and procedure *see* Lord Diplock in *F. Hoffmann - La Roche & Co. A.G.* v. *Secretary of State for Trade and Industry*, [1975] A.C. 295 at 366 (H.L.) and *Inland Revenue Commissioners* v. *National Federation of Self-Employed and Small Businesses Ltd.*, [1981] 2 W.L.R. 722 at 734 (H.L.).

[14] *Compare Re Walker and West Hants Municipal School Board* (1973), 42 D.L.R. (3d) 105 (N.S.S.C., App. Div.) *with Woodward Stores (Westmount) Limited* v. *Alberta Assessment Appeal Board Division No. 1*, [1976] 5 W.W.R. 496 (Alta. S.C.).

[15] *Judicial Review Procedure Act*, R.S.O. 1980, c. 224, as am. by S.O. 1984, c. 11, s. 188 (first enacted as S.O. 1971, c. 48) (hereinafter noted as "Ont").

Commission Inquiry into Civil Rights.[16] New Zealand[17] and British Columbia[18] followed with modified versions of the Ontario legislation. A similar scheme has been adopted in England,[19] although rules of court, rather than primary legislation, were employed as the principal vehicle of reform.

4.07 Central to this reform model is the introduction of a single application for judicial review available by summary procedure. On such

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[16] Ontario (1968), Report No. 1, Vol. 1 (Hon. J.C. McRuer).

[17] *Judicature Amendment Act 1972*, No. 130 of 1972, as am. by *Judicature Amendment Act 1977*, No. 32 of 1977 (hereinafter noted as "NZ"). The initial legislation and later amendments were based on the recommendations of the Public and Administrative Law Reform Committee (New Zealand), *Administrative Tribunals: Constitution, Procedure and Appeals* (4th Report, 1971; 5th Report, 1972; 8th Report, 1975).

[18] *Judicial Review Procedure Act*, R.S.B.C. 1979, c. 209, as am. by *Court of Appeal Act*, S.B.C. 1982, c. 7, s. 64 (first enacted as S.B.C. 1976, c. 25) (hereinafter noted as "BC"). The legislation was adopted pursuant to the recommendations of the Law Reform Commission of British Columbia, *Report on Civil Rights, Part IV - A Procedure for Judicial Review of the Actions of Statutory Agencies* (Report No. 18, 1974).

[19] Order 53 of the Rules of the Supreme Court as substituted in 1977 by the Rules of the Supreme Court (Amendment No. 3) 1977, (S.I. 1977 No. 1955), as am. by the Rules of the Supreme Court (Amendment No. 4) 1980, (S.I. 1980 No. 2000), as am. by the Rules of the Supreme Court (Amendment No. 2) 1982, (S.I. 1982 No. 1111) (hereinafter noted as "Eng Rules"). The Rules have been in part put into statutory form by the *Supreme Court Act 1981*, c. 54, s. 31 (U.K.) (hereinafter noted as "Eng Act"). These reforms were based on the proposals of The Law Commission (England), *Report on Remedies in Administrative Law* (Law Com. No. 73, Cmnd. 6407, 1976) preceded by The Law Commission (England), "Remedies in Administrative Law" (Working Paper No. 40, 1971).

For two other schemes of judicial review which resemble the English scheme, *see* Saskatchewan, *Queen's Bench Rules*, Part Fifty-Two, as revised in 1983 (hereinafter noted as "Sask"); Institute of Law Research and Reform (Alberta), *Judicial Review of Administrative Action: Application for*

(Footnote continued to page 65)

application, the court is empowered to award any relief to which the applicant would be entitled in proceedings for relief in the nature of the public law remedies of mandamus, prohibition or certiorari.[20] Provision is also made for the granting of declaratory or injunctive relief. However, because the declaration and injunction are also remedies in private law, it is necessary to confine somehow the awarding of these remedies under the new scheme to reviewable public law matters. In an attempt to achieve this result, several

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(Footnote continued from page 64)
Judicial Review (Report No. 40, 1984) (hereinafter noted as "Alta". References will be to the rules as recommended in the Institute's Report).

[20] Ont, s. 2(1); NZ, s. 4(1); BC, s. 2(2); Eng Act, s. 31(1), Eng Rules, r. 1(1); Alta, r. 753.4(1); Sask, r. 664(1). The proposed rule in Alberta also includes quo warranto and habeas corpus while the Saskatchewan rule includes quo warranto. England (Eng Act, s. 30(1) and s. 31(1)) and British Columbia (BC, s. 19) make provision for the awarding of an injunction in circumstances formerly amenable to quo warranto proceedings.

Note that while the Eng Rules, r. 1(1) refers to "an application for an order of mandamus, prohibition or certiorari", the other jurisdictions (Ont, NZ, BC and Alta), with minor variations, refer to the granting of relief that an applicant would be entitled to in proceedings for relief (or an order) "*in the nature of* mandamus, prohibition or certiorari" [emphasis added]. For possible interpretations of this latter formulation, *see Culhane* v. *Attorney-General of British Columbia* (1980), 108 D.L.R. (3d) 648 (B.C.C.A.), per Lambert J.A. There appears to be little practical difference between the various formulations, although the interpretation of the phrase "in the nature of" mandamus, etc. has proven somewhat difficult. *Compare Re Brown and the Queen* (1975), 11 O.R. (2d) 7 (H.C.) and *Re Beke and The Queen* (1977), 15 O.R. (2d) 603 (Div. Ct.) where it was indicated that a statutory motion to quash a conviction for a provincial offence is not an application for "an order in the nature of certiorari", *with Re Ontario Provincial Police Association Inc. and the Queen in Right of the Province of Ontario* (1974), 46 D.L.R. (3d) 518 (Ont. Div. Ct.) and *Re Major Holdings & Developments Ltd. and Incorporated Synod of the Diocese of Huron* (1979), 94 D.L.R. (3d) 474 (Ont. Div. Ct.) where it was held that the common law quashing of a decision of a consensual arbitrator may be viewed as "an order in the nature of certiorari". *See also Re Rees and United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States and Canada, Local* 527 (1983), 150 D.L.R. (3d) 493 (Ont. Div. Ct.); *Re Selkirk and Schorr* (1977), 15 O.R. (2d) 37 (Div. Ct.).

jurisdictions empower the court to grant a declaration or injunction only in relation to the exercise of a "statutory power".[21] Others adopt a discretionary formula whereby declarations and injunctions may be awarded under the new procedure where the court considers it just and convenient to do so, having regard to the nature of the matters in respect of which, and the nature of the bodies against which, the prerogative orders are available and all the circumstances of the case.[22]

4.08 In Ontario, "statutory power" is defined as

> . . . a power or right conferred by or under a statute,
>
> (i) to make any regulation, rule, by-law or order, or to give any other direction having force as subordinate legislation,
>
> (ii) to exercise a statutory power of decision,
>
> (iii) to require any person or party to do or to refrain from doing any act or thing that, but for such requirement, such person or party would not be required by law to do or to refrain from doing,
>
> (iv) to do any act or thing that would, but for such power or right, be a breach of the legal rights of any person or party.[23]

"Statutory power of decision" is defined as

> . . . a power or right conferred by or under a statute to make a decision deciding or prescribing,
>
> (i) the legal rights, powers, privileges, immunities, duties or liabilities of any person or party, or

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[21] Ont, s. 2(1); NZ, s. 4(1); BC, s. 2(2). Note that in New Zealand, the availability of all forms of relief (including the prerogative remedies) is delimited by "statutory power".

[22] Eng Act, s. 31(2), Eng Rules, r. 1(2); Alta, r. 753.4(2). *Cf.* Sask, r. 664(2).

[23] Ont, s. 1(g).

(ii) the eligibility of any person or party to receive, or to the continuation of, a benefit or licence, whether he is legally entitled thereto or not,

and includes the powers of an inferior court.[24]

These terms are similarly defined in New Zealand and British Columbia, although in both these jurisdictions, the definition of "statutory power" has been expanded to include a power or right to make an investigation or inquiry into a person's rights, powers, privileges, immunities, duties or liabilities.[25] As well, the New Zealand legislation appears somewhat wider in that "statutory power of decision" is defined as a power to make a decision "deciding or prescribing *or affecting*" rights, etc.[26] [emphasis added]. Furthermore, the opening words of the New Zealand definitions of both

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[24] Ont, s. 1(f).

[25] NZ, s. 3; BC, s. 1. For difficulties encountered in Ontario with respect to the review of investigations or recommendations, *see Re Florence Nightingale Home and Scarborough Planning Board*, [1973] 1 O.R. 615 (Div. Ct.); *Re Starr and Township of Puslinch (No. 2)* (1977), 16 O.R. (2d) 316 (Div. Ct.); *Re Hancock and Board of Governors of Algonquin College of Applied Arts & Technology* (1981), 33 O.R. (2d) 257 (H.C.). *But see Chadwill Coal Co. Ltd.* v. *Treasurer and Minister of Economics and Intergovernmental Affairs for the Province of Ontario* (1976), 1 M.P.L.R. 25 (Ont. Div. Ct.); *Re Downing and Graydon* (1978), 21 O.R. (2d) 292 (C.A.); *Re Abel and Director, Penetanguishene Mental Health Centre* (1979), 24 O.R. (2d) 279 (Div. Ct.); *Re Aamco Automatic Transmissions Inc. and Simpson* (1980), 29 O.R. (2d) 565 (Div. Ct.); *Re Emerson and Law Society of Upper Canada* (1983), 5 D.L.R. (4th) 294 (Ont. H.C.). *See also Thames Jockey Club Inc.* v. *New Zealand Racing Authority*, [1974] 2 N.Z.L.R. 609 (S.C.), aff'd [1975] 2 N.Z.L.R. 768 (C.A.) for the pre-1977 position in New Zealand.

[26] NZ, s. 3. *See e.g.*, *Daemar* v. *Gilliand*, [1981] 1 N.Z.L.R. 61 (C.A.); *Webster* v. *Auckland Harbour Board*, [1983] N.Z.L.R. 646 (C.A.). Note also the absence in the New Zealand definition of the qualification that *legal* rights etc. be involved, commented upon in the *Webster* case, *above*, and in *Chandra* v. *Minister of Immigration*, [1978] 2 N.Z.L.R. 559 (S.C.). *Compare Re Robertson and Niagara South Board of Education* (1973), 1 O.R. (2d) 548 (Div. Ct.) *with Re Grant and Municipality of Metropolitan Toronto* (1978), 21 O.R. (2d) 282 (Div. Ct.)

"statutory power" and "statutory power of decision" include a power or right conferred by or under "the constitution or other instrument of incorporation, rules, or bylaws of any body corporate" in addition to a power or right conferred by or under an Act.[27] This latter addition was made in an attempt to include within the scope of the legislation the review of decisions of domestic tribunals such as the governing bodies of trade unions and incorporated societies.[28]

4.09 The employment of "statutory power" and "statutory power of decision" to confine the declaration and injunction to the public law realm has proven somewhat problematic. Several early decisions in Ontario exhibited a misapprehension of the function and scope of these terms under the Act.[29] More significantly, the definitions of "statutory power" and "statutory power of decision" fail to capture some of the public functions which are subject to the declaratory and injunctive remedies at common law.

4.10 Powers exercised pursuant to the royal prerogative or common law, rather than statute, are not included within these terms,[30] nor, in Ontario

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[27] NZ, s. 3.

[28] Pursuant to a recommendation in the Public and Administrative Law Reform Committee's 8th Report, *supra* n. 17. *Quaere* if this extension is over-inclusive in that it may be capable of being interpreted as permitting the review of decisions made by private businesses incorporated under general companies' legislation. For the view that in some respects it is under-inclusive *see* J.A. Smillie, "The Judicature Amendment Act 1977", [1978] N.Z.L.J. 232. *See also Arnold* v. *Hewitt* (March 1982), noted in [1982] NZ Recent Law 130 for an unsuccessful application under this expanded definition of "statutory power".

[29] *See e.g., Re Robertson and Niagara South Board of Education, supra* n. 26; *Re Florence Nightingale Home and Scarborough Planning Board*, [1973] 1 O.R. 615 (Div. Ct.); *Re Maurice Rollins Construction Ltd. and Township of South Fredericksburgh* (1975), 11 O.R. (2d) 418 (H.C.); *Re Dodd and Chiropractic Review Committee* (1978), 23 O.R. (2d) 423 (Div. Ct.).

[30] *Daemar* v. *Gilliand*, [1979] 2 N.Z.L.R. 7 (S.C.), aff'd [1981] 1 N.Z.L.R. 61 (C.A.). *See also Re Air Canada and Attorney-General of British Columbia* (1982), 141 D.L.R. (3d) 530 (B.C.S.C.), aff'd (1983), 150 D.L.R.

(Footnote continued to page 69)

and British Columbia, are powers exercised by non-statutory domestic tribunals included.[31] Judicial interpretation has also resulted in the exclusion of ministerial duties involving no exercise of discretion, and of results which flow automatically from the operation of a statute.[32] Decisions or recommendations made by internal committees, which are not themselves empowered by statute but which are informally established by an official or body exercising statutory powers, have also been held to fall outside the scope of these terms.[33]

4.11 Not every decision made pursuant to statutory authority involves the exercise of a statutory power of decision within the terms of the Act. It has been said that statutory authority to make the very decision in question is required; decisions made pursuant to general statutory powers of control and management do not suffice.[34] 'Business decisions' made by public statutory authorities involving, for example, the exercise of powers to enter into contracts or dispose of property are generally viewed as matters of private

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(Footnote continued from page 68)
(3d) 653 (B.C.C.A.); *Babineau* v. *The Queen* (1983), 6 Admin. L.R. 41 (Ont. Div. Ct.).

[31] *Pestell* v. *Kitchener-Waterloo Real Estate Board Inc.* (1981), 34 O.R. (2d) 476 (Div. Ct.).

[32] *Re Lamoureux and Registrar of Motor Vehicles*, [1973] 2 O.R. 28 (C.A.); *Re Infant* (1981), 32 B.C.L.R. 20 (S.C.); *Re Zukowski and The Queen in Right of British Columbia* (1986), 25 D.L.R. (4th) 627 (B.C.S.C.). *But cf. Islands Protection Society* v. *R. in Right of British Columbia*, [1979] 4 W.W.R. 1 (B.C.S.C.). For a criticism of *Re Lamoureux, above, see e.g.*, M.T. MacCrimmon, "The British Columbia Judicial Review Procedure Act: Procedural Means for Obtaining Judicial Review" in *Proceedings of the Administrative Law Conference, University of British Columbia* (1979) 98.

[33] *Re Raney and the Queen in Right of Ontario* (1974), 4 O.R. (2d) 249 (C.A.).

[34] *Re Midnorthern Appliances Industries Corp. and Ontario Housing Corporation* (1977), 17 O.R. (2d) 290 (Div. Ct.); *Paine* v. *University of Toronto* (1981), 34 O.R. (2d) 770 (C.A.). *Compare with Re Hussey and Attorney-General for Ontario* (1984), 46 O.R. (2d) 554 (Div. Ct.).

law, outside the scope of the judicial review legislation.[35] If, however, the exercise of such 'business powers' is altered or governed by special statutory provision, the exercise of a statutory power of decision within the terms of the Act may be held to subsist.[36]

4.12 It is to be noted that a direct challenge to the constitutional validity of primary legislation is not to be sought under the judicial review legislation, as no exercise of a statutory power is at issue.[37]

4.13 The Ontario model of legislation goes a considerable way toward the creation of a simple, uniform procedure for seeking judicial review. Since all forms of relief[38] may be sought in one proceeding, the applicant no longer runs the risk of being refused relief because he has chosen to pursue the wrong specific remedy.[39] As well, the significance of the distinction between the availability of certiorari and declaration has been to some extent mitigated.[40]

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[35] *Re Midnorthern Appliances Industries Corp. and Ontario Housing Corporation, ibid.*; *Re Cordsen and Greater Victoria Water District* (1982), 134 D.L.R. (3d) 456 (B.C.S.C.); *New Zealand Stock Exchange* v. *Listed Companies Association Inc.*, [1984] 1 N.Z.L.R. 699 (C.A.). *But see Webster* v. *Auckland Harbour Board, supra* n. 26. For a discussion of the distinction between private and public functions of a public authority in a different context, *see Berardinelli* v. *Ontario Housing Corporation*, [1979] 1 S.C.R. 275.

[36] *Allard Contractors Ltd.* v. *District of Coquitlam* (1982), 18 M.P.L.R. 188 (B.C.S.C.); *Re Carpenter and Vancouver Police Board* (1983), 149 D.L.R. (3d) 405 (B.C.S.C.), aff'd (1985), 18 D.L.R. (4th) 585 (B.C.C.A.).

[37] *Re Service Employees International Union, Local 204 and Broadway Manor Nursing Home* (1984), 13 D.L.R. (4th) 220 (Ont. C.A.).

[38] With the exception of damages. *See Re Seaway Trust Co. and The Queen in the Right of Ontario* (1983), 146 D.L.R. (3d) 620 (Ont. C.A.), rev'g (1983), 146 D.L.R. (3d) 586 (Ont. Div. Ct.). *Quaere* if damages could be awarded under Ont, s. 8.

[39] In this regard, note Ont, s. 9(1) which relieves the applicant of specifying the exact remedy sought and Ont, s. 2(6) which negatives the court's former discretion to refuse relief on the basis that a different form of relief should have been requested. *See also* NZ, s. 9(3) and s. 4(4); BC, s. 14 and s. 8(2).

4.14 However, the availability of relief under the judicial review procedure legislation is, to a large extent, dependent upon the substantive law which governed entitlement to the individual remedies at common law.[41] As a result, for example, the uncertain and diverse rules of *locus standi* still pertain to the various forms of relief available upon an application for review.[42] Furthermore, the major defect of the Ontario reform is that the legislation fails to capture within its ambit all those administrative law matters amenable to judicial review at common law. The term chosen to delimit the scope of declaratory and injunctive relief - "statutory power" - is too narrow and inflexible. This detracts considerably from the creation of a single procedure under which judicial review for administrative acts and omissions may be sought without regard to technical remedial distinctions.[43]

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[40] Ont, s. 2(4), NZ, s. 4(2) and BC, s. 7 allow for the setting aside of a decision where the applicant is entitled to a declaration of invalidity in relation to the review of a statutory power of decision.

[41] Although this is not to say that such substantive law is not capable of development and evolution under the Act. *See e.g.*, *Re Rees and United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States and Canada, Local 527*, *supra* n. 20.

[42] As observed by D.J. Mullan, "Reform of Judicial Review of Administrative Action - The Ontario Way" (1974), 12 Osgoode Hall L.J. 125; M.T. MacCrimmon, *supra* n. 32; M. Rankin and M. Horne, "Procedural Fairness - Standing - Statutory Power of Decision - Judicial Review Procedure Act - *Islands Protection Society et al. v. The Queen in Right of British Columbia et al.*" (1979), 14 U.B.C.L. Rev. 205 at 208.

[43] For a more in-depth analysis of the Ontario style of reform, *see e.g.*, D.J. Mullan, "Confusion Perpetuated: The Judicial Review Procedure Act Before the Divisional Court" (1974), 22 Chitty's L.J. 297; D.J. Mullan, *ibid.*; D.J. Mullan, "Reform of Administrative Law Remedies - Method or Madness?" (1975), 6 Fed. L. Rev. 340; D.J. Mullan, "Judicial Review of Administrative Action", [1975] N.Z.L.J. 154; J.M. Evans, "Judicial Review in Ontario - Recent Developments in the Remedies - Some Problems of Pouring Old Wine into New Bottles" (1977), 55 Can. Bar Rev. 148; J.A. Smillie, *supra* n. 28; M.T. MacCrimmon, *supra* n. 32.

4.15 As mentioned previously, a new summary procedure for judicial review has also been introduced in England.[44] The prerogative remedies and, in certain circumstances, declaratory and injunctive relief may be granted thereunder. Provision is made for the awarding of damages in appropriate cases.[45]

4.16 A discretionary formula has been adopted for identifying the circumstances in which the declaration and injunction may be awarded, to wit:

> if [the court] considers that, having regard to -
>
> (a) the nature of the matters in respect of which relief may be granted by way of an order of mandamus, prohibition or certiorari,
>
> (b) the nature of the persons and bodies against whom relief may be granted by way of such an order, and
>
> (c) all the circumstances of the case,
>
> it would be just and convenient for the declaration or injunction to be granted on an application for judicial review.[46]

This formula was intended to serve a purpose similar to that of "statutory power" under the Ontario scheme: to confine the availability of declaratory and injunctive relief under the new procedure to reviewable administrative law matters. Concern was expressed that the formula might restrict the awarding of the declaration and injunction to situations where the prerogative remedies were technically available.[47] However, such would not appear to be the

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[44] Eng Act, s. 31(1) and s. 31(2); Eng Rules, r. 1.

[45] Eng Rules, r. 7. *Cf*. Sask, r. 664(2)(b).

[46] Eng Rules, r. 1(2). *Cf*. Alta, r. 753.4(2); Sask, r. 664(2).

[47] As seemed to be suggested in *Inland Revenue Commissioners* v. *National Federation of Self-Employed and Small Businesses Ltd.*, *supra* n. 13, per Lord Diplock and Lord Scarman. *See* J. Beatson and M.H. Matthews, *supra* n.

(Footnote continued to page 73)

result; the case law suggests that the reference to the availability of the prerogative remedies serves as a guideline only.[48]

4.17 The English formula appears broader and more flexible than Ontario's "statutory power", capturing within its ambit most administrative law matters, including the exercise of powers pursuant to the royal prerogative.[49] The courts, however, have determined that judicial review of the decisions of domestic tribunals is not available under the new procedure.[50]

4.18 From the Report of The Law Commission which preceded the reform in England, and from the Rules and Act themselves, it seems clear that the new judicial review application was not intended to constitute an exclusive procedure for judicial review; ordinary actions for declaratory and injunctive relief in relation to public law matters were to remain a procedural option.[51] However, the House of Lords has ruled that, subject to certain exceptions the exact nature of which remains uncertain, proceedings respecting the infringement of rights that are entitled to protection in public law must be brought under the new review procedure.[52] It would be contrary to public

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(Footnote continued from page 72)

13; P. Cane, "Standing, Legality and the Limits of Public Law", [1981] Pub. L. 322. *But see* J. Griffiths, "Mickey Mouse and Standing in Administrative Law" (1982), 41 Camb. L.J. 6.

[48] *R.* v. *British Broadcasting Corporation*, [1983] 1 W.L.R. 23 (Q.B.D.); *Law* v. *National Greyhound Racing Club Ltd.*, [1983] 1 W.L.R. 1302 (C.A.); *R.* v. *Bromley London Borough Council*, [1984] The Times L.R., June 16th, 1984, #390 (Q.B.D.).

[49] *Council of Civil Service Unions* v. *Minister for the Civil Service*, [1984] 3 W.L.R. 1174 (H.L.).

[50] *R.* v. *British Broadcasting Corporation*, *supra* n. 48; *Law* v. *National Greyhound Racing Club Ltd.*, *supra* n. 48. *But cf.* *Chyz* v. *Appraisal Institute of Canada* (1985), 44 Sask. R. 165 (C.A.), rev'g (1984), 36 Sask. R. 266 (Q.B.) regarding proceedings under the Saskatchewan Rules.

[51] Report of The Law Commission, *supra* n. 19, §34.

[52] *O'Reilly* v. *Mackman*, [1982] 3 W.L.R. 1096 (H.L.); *Cocks* v. *Thanet*

(Footnote continued to page 74)

policy, said the Court, to permit an applicant to institute an ordinary action and thereby evade the special safeguards which the new procedure in England provides public authorities. These special protections include the following:

(a) Proceedings by way of application for judicial review are more speedy and efficient than proceedings by way of action.

(b) An application for judicial review is subject to a three-month (though extendable) limitation period.

(c) The requirement for leave of the court to bring judicial review proceedings helps to weed out frivolous or unmeritorious claims.

(d) Applications for judicial review must be supported by sworn affidavits rather than unsworn statements of claim.

(e) An applicant has no automatic right to discovery on an application for review; a specific order for discovery must be obtained.

As well, applications for judicial review are heard by the Queen's Bench Divisional Court which has developed considerable expertise in administrative law matters.

4.19 Because no clear demarcation exists between public law issues and private law issues (indeed, the two are often enmeshed), the litigant wishing to institute proceedings against a public authority is faced with a new procedural dilemma. Some claims involving questions of both private and public law have been severed, with the court allowing part of the claim to proceed by action while striking out other parts as raising public law issues which could be dealt with only by application for judicial review.[53]

(Footnote continued from page 73)
District Council, [1982] 3 W.L.R. 1121 (H.L.). *See also Heywood* v. *Board of Visitors of Hull Prison*, [1980] 1 W.L.R. 1386 (Ch. D.). *Cf. Gillick* v. *West Norfolk and Wisbech Area Health Authority*, [1985] 3 W.L.R. 830 (H.L.).

One exception to this general principle recognized in *O'Reilly, above*, is "where the invalidity of the decision arises as a collateral issue in a claim for infringement of a right of the plaintiff arising under private law" (at p. 1110).

[53] *Davy* v. *Spelthorne Borough Council*, [1983] 3 W.L.R. 742 (H.L.). *Compare with An Bord Bainne Co-operative Ltd. (Irish Dairy Board)* v. *Milk Marketing Board*, [1984] The Times L.R., May 22nd, 1984, #332 (C.A.). *See also Cocks* v. *Thanet District Council, ibid.*

Difficult questions have also arisen as to whether an application for judicial review is appropriate in cases of wrongful dismissal where the employer is a public body.[54]

4.20 The new application for judicial review in England provides an avenue by which all forms of judicial review remedies may be sought in one proceeding. Unfortunately, by holding that the new procedure is generally the exclusive method for determining questions of public law, the House of Lords has created a procedural snare for applicants whose claims involve a mixture of private law and public law issues. Good cases may be lost by choice of the wrong procedure. "This is exactly what Order 53 was designed to prevent, but in fact more cases have been lost for this reason since it was introduced than were lost in several decades beforehand."[55] It is to be hoped that the House of Lords will soon provide litigants with clear guidelines as to the appropriate use of actions and applications for review in relation to the activities of public authorities.

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[54] *Compare Chief Constable of the North Wales Police* v. *Evans*, [1982] 1 W.L.R. 1155 (H.L.); *R.* v. *Secretary of State for the Home Department, ex parte Benwell*, [1984] 3 All E.R. 854 (Q.B.D.) *with R.* v. *East Berkshire Health Authority*, [1984] 3 W.L.R. 818 (C.A.). *See also Ridge* v. *Baldwin*, [1963] 2 All E.R. 66 (H.L.); *Malloch* v. *Aberdeen Corporation*, [1971] 2 All E.R. 1278 (H.L.).

[55] H.W.R. Wade, "Public Law, Private Law and Judicial Review" (1983), 99 Law Q. Rev. 166 at 170. Note, however, Eng Rules, r. 9(5) which empowers the court to allow an application for a declaration, injunction or damages wrongfully instituted under Order 53 to be continued as an action. For further discussion and assessment of the procedure for judicial review in England, *see e.g.*, J. Beatson and M.H. Matthews, *supra* n. 13; C. Harlow, *supra* n. 13; J.L. Lambert, "Comments" (1978), 56 Can. Bar Rev. 668; J.F. Garner, "The Machinery of Judicial Review" (1982), 1 Civ. Just. Q. 292; R.S. Dexter, "O'Reilley v. Mackman: Further Confusion in Judicial Review" (1983), 5 Liverpool L. Rev. 187; S.M. Mott, "Order 53: Sole Source of Public Law Remedies?" (1983), 133 New L.J. 851; J. McBride, "The Doctrine of Exclusivity and Judicial Review: O'Reilly v. Mackman" (1983), 2 Civ. Just. Q. 268; A. Grubb, "Two Steps Towards a Unified Administrative Law Procedure", [1983] Pub. L. 190; P. Cane, "Public Law and Private Law: Some Thoughts Prompted by Page Motors Ltd. v. Epsom & Ewell B.C.", [1983] Pub. L. 202; M. Sunkin, "Judicial Review: Rights and Discretion in Public Law" (1983), 46 Mod. L. Rev. 645; A. Khan and A. Wolfgarten, "Judicial Review and Public Law" (1984), 3 Litigation 322; A.N. Khan, "Recent Developments in Judicial Review" (1984), 128 Solic. J. 491; H.W.R. Wade, "Procedure and Prerogative in Public Law" (1985), 101 Law Q. Rev. 180; C.F. Forsyth, "Beyond *O'Reilly* v. *Mackman*: The Foundations and Nature of Procedural Exclusivity" (1985), 44 Camb. L.J. 415.

4.21 Furthermore, as in Ontario, the model of reform adopted in England is largely of a procedural nature only. The substantive law attending the traditional forms of relief, with its many complexities, remains for the most part unaffected by the reform.[56]

C. A NEW STATUTORY REMEDY

4.22 As part of a comprehensive administrative law reform package, the Commonwealth of Australia enacted the *Administrative Decisions (Judicial Review) Act 1977*,[57] which came into effect October 1, 1980. It is this Act which exemplifies the third, and most ambitious, model of reform: the creation of a new statutory scheme of judicial review independent of the traditional forms of relief. Because reference to the traditional remedies is dispensed with entirely, both the procedural and substantive elements of the new remedy must be fashioned by express legislative provision. The substantive law is not incorporated, in a 'piggyback' fashion, by reference to the availability of the old remedies; rather, the scope of review under the legislation (the bodies against which, or the matters with respect to which, review may be sought), the nature of the applicant who may seek review (rule of *locus standi*), the grounds upon which review may be sought and the nature of relief which is available are all explicitly set out in the legislation.[58]

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[56] With the possible exception of the rules of *locus standi*. *See* Eng Act, s. 31(3). Opinion is divided as to whether this introduces a single uniform test for standing in judicial review proceedings. *Cf*. Sask, r. 665(1).

[57] *Administrative Decisions (Judicial Review) Act 1977*, No. 59 of 1977, as am. by *Administrative Decisions (Judicial Review) Amendment Act 1978*, No. 66 of 1978, as am. by *Administrative Decisions (Judicial Review) Amendment Act 1980*, No. 111 of 1980, as am. by *Defence Force (Miscellaneous Provisions) Act 1982*, No. 153 of 1982, as am. by *Ombudsman (Miscellaneous Amendments) Act 1983*, No. 62 of 1983 (hereinafter noted as "Aust"). Minor amendments affecting only the schedules to the Act are not cited. This Act was based on the general recommendations in *Report of Commonwealth Administrative Review Committee*, Parliamentary Paper No. 144 (1971) ("Kerr Committee Report") and *Prerogative Writ Procedures - Report of Committee of Review*, Parliamentary Paper No. 56 (1973) ("Ellicott Committee Report").

4.23 The Australian Act applies to the review of "a decision of an administrative character" made (whether in the exercise of a discretion or not) under an enactment.[59] The making of a decision is defined to include a wide variety of activities,[60] including the making of a report or recommendation prior to making a decision.[61] Review may also be sought in relation to conduct engaged in for the purpose of making a decision to which the Act applies,[62] and for failure to fulfil a duty to make a decision to which the Act applies.[63]

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[58] This model has also been adopted, to a limited extent, in s. 28 of the *Federal Court Act*, R.S.C. 1970 (2nd Supp.), c. 10 (hereinafter noted as "Can"). The *Federal Court Act* has been the subject of extensive study by the Law Reform Commission of Canada (*see* D.J. Mullan, *The Federal Court Act*, Law Reform Commission of Canada (1977); Law Reform Commission of Canada, "Federal Court: Judicial Review" (Working Paper No. 18, 1977); Law Reform Commission of Canada, *Judicial Review and the Federal Court* (Report No. 14, 1980) (hereinafter noted as "LRCC"). *See also* N.M. Fera, "LRC's Proposals for Reform of the Federal Judicial Review System - A Critical Examination and Counterpoise" (1977), 8 Man. L.J. 529; Department of Justice (Canada), *Proposals to Amend The Federal Court Act* (August, 1983)). One of the Law Reform Commission's principal recommendations was that judicial review of all federal administrative authorities should originate in the Trial Division of the Federal Court. In determining how to structure the Court's jurisdiction, they rejected the option of relying on the prerogative and other extraordinary remedies. They rejected also the option of devising a new application for judicial review under which the traditional remedies could be sought (as was done in Ont, BC, NZ and Eng Rules). Instead, they recommended the adoption of a new statutory remedy in which the grounds of review and forms of relief would be expressly articulated. This parallels the general model of reform implemented in Australia, although the specific details differ significantly from the Australian Act.

For another example of this model of reform *see* Barbados' *Administrative Justice Act, 1980*, c. 1980-63, proclaimed in force July 7, 1983 (hereinafter noted as "Barb"). The scope of the Act, the rules of *locus standi* and the grounds of review are expressly delineated. Note, however, that the available forms of relief are set out by referring to the traditional remedies by name: s. 5(1), s. 5(2).

See also Code of Civil Procedure, L.R.Q. 1977, c. C-25 (hereinafter noted as "PQ"), art. 846 wherein the grounds for evocation (a merger of certiorari and prohibition) are codified. Remedies similar in nature to quo warranto and mandamus are also the subject of codification: PQ, art. 838, art. 844. For proposals for reform, *see* Comité sur la révision judiciaire (Québec), *Recours en Surveillance Judiciaire* (Rapport Préliminaire, décembre 1976).

[59] Aust, s. 3(1), s. 5(1). However, decisions made by the Governor-General, decisions included in any of the classes of decisions set out in Schedule 1 of the Act, and decisions encompassed by regulation pursuant to s. 19 of the Act are exempt from review under the Act.

An "enactment" includes, *inter alia*, an Act or an instrument (including rules, regulations or by-laws) made under an Act (Aust, s. 3(1)).

4.24 An application for review may be brought by a "person who is aggrieved by a decision" to which the Act applies,[64] which includes a person whose interests are adversely affected by the decision.[65] It has been held that "[a] person who can show a grievance beyond that of an ordinary member of the public is a person aggrieved".[66]

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[60] Aust, s. 3(2).

[61] Aust, s. 3(3).

[62] Aust, s. 3(5), s. 6(1).

[63] Aust, s. 3(1), s. 3(2), s. 7(1), s. 7(2).

[64] Aust, s. 5(1).

[65] Aust, s. 3(4)(a)(i). *Compare with* LRCC, Recommendation 6.1: "All parties aggrieved should have standing in proceedings for judicial review, and the court should in addition have a discretion to grant standing to any person who it concludes has a legitimate interest"; Barb, s. 6, which allows the Court to grant relief "to a person whose interests are adversely affected by an administrative act or omission" or "to any other person if the Court is satisfied that that person's application is justifiable in the public interest in the circumstances of the case". With respect to standing to bring an application for review in relation to the making of reports, conduct engaged in for the purpose of making a decision and failure to make a decision, *see* Aust, s. 3(4)(a)(ii), s. 3(4)(b), s. 6(1) and s. 7.

[66] *Lamb* v. *Moss* (1983), 49 A.L.R. 533 at 554 (F.C. Aust., Full Court). *See also Ricegrowers Co-operative Mills Ltd.* v. *Bannerman* (1981), 56 F.L.R. 443 (F.C. Aust., Full Court).

4.25 The grounds upon which an order of review may be awarded are the subject of detailed codification in the Australian Act.[67] For the most part, they correspond fairly closely to the common law grounds of judicial review.[68]

4.26 On an application for an order of review, the Court is empowered to make an order quashing or setting aside the decision or part of the decision, an order referring the matter back to the decision-maker for further consideration, an order directing the making of the decision, an order declaring the rights of the parties, or an order directing any of the parties to do, or to refrain from doing, any act or thing.[69] These orders generally parallel the nature of relief available by way of the prerogative, injunctive and declaratory remedies.

4.27 The key to the scope and operation of the Act is the phrase "*decision* of an *administrative character* made, proposed to be made, or required to be made, as the case may be (whether in the exercise of a discretion or not) *under an enactment*"[70] [emphasis added]. Unfortunately, the interpretation of this delimitative phrase has been the source of frequent litigation.

4.28 The question has arisen as to whether "decision" includes an intermediate ruling or determination made in the course of making an ultimate decision, or rather is confined to a decision which finally determines rights or obligations or which may be said to have an ultimate and operative effect.[71]

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[67] Aust, s. 5, s. 6, s. 7. *See also* Barb, s. 4. *Compare with* the more general grounds of review suggested in LRCC, Recommendation 4.3; PQ, art. 846.

[68] *See e.g.*, G.A. Flick, *Federal Administrative Law* (1983) 184 *et seq.* for a detailed examination of the grounds.

[69] Aust, s. 16(1), s. 16(2), s. 16(3). *Compare with* LRCC, Recommendation 4.4.

[70] Aust, s. 3(1). *Compare with* Barb, s. 2, s. 3(1).

[71] *Compare Riordan* v. *Parole Board of the Australian Capital Territory*

(Footnote continued to page 80)

4.29 The phrase "of an administrative character" has been interpreted to include decisions which, under the traditional scheme of classification, would have been labelled either administrative or quasi-judicial.[72] However, it is clear that decisions of a judicial nature or of a legislative nature (i.e. subordinate legislation of general application) cannot be reviewed under the Act.[73] Unfortunately, whether a decision is administrative or judicial,[74] or administrative or legislative,[75] is often not free from dispute.

(Footnote continued from page 79)
(1981), 34 A.L.R. 322 (F.C. Aust) *with Lamb* v. *Moss*, *supra* n. 66. The same question has arisen as to the meaning of "decision" under the *Federal Court Act* (Can, s. 28(1)). For a review of the Canadian cases, *see* D.J. Mullan, *supra* n. 58; *Re Anheuser-Busch, Inc. and Carling O'Keefe Breweries of Canada Ltd*. (1982), 142 D.L.R. (3d) 548 (F.C.A.). *See also* LRCC, Recommendation 4.5.

For further issues with respect to "decision" under the Australian Act, *see Ricegrowers Co-operative Mills Ltd*. v. *Bannerman*, *supra* n. 66; *Barbaro* v. *McPhee* (1982), 42 A.L.R. 147 (F.C. Aust.); *Baker* v. *Campbell* (1982), 44 A.L.R. 431 (F.C. Aust.); *Nomad Industries of Australia Pty Ltd*. v. *Federal Commissioner of Taxation* (1983), 51 A.L.R. 95 (N.S.W.S.C., Admin. Law Div.); *Mayer* v. *Minister for Immigration and Ethnic Affairs* (1984), 55 A.L.R. 587 (F.C. Aust.), aff'd (1985), 58 A.L.R. 695 (F.C. Aust., Full Court).

[72] *Hamblin* v. *Duffy* (1981), 50 F.L.R. 308 (F.C. Aust.).

[73] *Hamblin* v. *Duffy*, *ibid*.; *Evans* v. *Friemann* (1981), 35 A.L.R. 428 (F.C. Aust.).

[74] *Compare Trimboli* v. *Onley* (1981), 37 A.L.R. 38 (N.S.W.S.C., Eq. Div.), aff'd (1981), 37 A.L.R. 354 (N.S.W.S.C., C.A.); *Baker* v. *Campbell*, *supra* n. 71; *Appliance Holdings Pty Ltd*. v. *Lawson*, [1983] 1 N.S.W.L.R. 246 (S.C., Eq. Div.) *with Brewer* v. *Castles (No. 1)* (1984), 52 A.L.R. 571 (F.C. Aust.) regarding a decision to issue a search warrant. *See also Legal Aid Commission of Western Australia* v. *Edwards* (1982), 61 F.L.R. 419 (F.C. Aust.); *Lloyd* v. *Costigan* (1983), 48 A.L.R. 241 (F.C. Aust.); *Lamb* v. *Moss*, *supra* n. 66; *Registrar of Motor Vehicles* v. *Dainer* (1985), 57 A.L.R. 759 (F.C. Aust.).

[75] *Minister for Industry and Commerce* v. *Tooheys Ltd*. (1982), 42 A.L.R. 260 (F.C. Aust., Full Court).

4.30 Problems have also arisen in relation to the requirement that the decision be made "under an enactment". It has been established that the power to make the particular decision in question need not be precisely stated in order to satisfy this requirement; a decision stemming from broadly-stated statutory powers will suffice.[76] However, the source of the decision-making power must be an enactment; decisions made pursuant to the royal prerogative are not included,[77] nor are decisions made by internal bodies or committees which are not established or empowered by enactment.[78] This latter excluded category includes bodies established by ministerial directive.[79] Activities carried out in the ordinary course of administering the business affairs of government are not properly subject to judicial review, and do not fall within the scope of the Act.[80]

4.31 Some of the most difficult issues respecting whether a decision was made "under an enactment" have arisen in the context of dismissal or suspension of an officer or employee by a public authority. The precise facts of each particular case must be examined closely to determine whether dismissal was pursuant to powers conferred under an enactment or pursuant to contract only. Insofar as any general principles can be extracted from the cases, it appears that the mere fact that the employer is a public body created by statute or that its empowering statute confers upon it the power to engage staff and establish terms of employment, does not by itself mean that what is done by way of promotion, suspension or dismissal is done "under an enactment" within the terms of the Act. In order for such a decision to be reviewable under the Act, the governing legislation must provide the employee with some special rights or procedural protections, or in some way modify the ordinary contractual powers attending the employer/employee relationship.[81]

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[76] *Evans* v. *Friemann*, *supra* n. 73; *Burns* v. *Australian National University* (1982), 40 A.L.R. 707 (F.C. Aust.), rev'd on other grounds, but confirmed on this point (1982), 43 A.L.R. 25 (F.C. Aust., Full Court).

[77] J. Griffiths, "Legislative Reform of Judicial Review of Commonwealth Administrative Action" (1978), 9 Fed. L. Rev. 42; *Hawker Pacific Pty Ltd.* v. *Freeland* (1983), 52 A.L.R. 185 (F.C. Aust.). *See also Mayer* v. *Minister for Immigration and Ethnic Affairs*, *supra* n. 71; *Lloyd* v. *Costigan*, *supra* n. 74.

[78] *Gourgaud* v. *Lawton* (1982), 42 A.L.R. 117 (F.C. Aust.); *Excell* v. *Harris* (1983), 51 A.L.R. 137 (F.C. Aust.); *MacDonald Pty Ltd.* v. *Hamence* (1984), 53 A.L.R. 136 (F.C. Aust.).

[79] *Thurgood* v. *Director of Australian Legal Aid Office* (1984), 56 A.L.R. 565 (F.C. Aust.).

[80] *Cf. Hawker Pacific Pty Ltd.* v. *Freeland*, *supra* n. 77; *MacDonald Pty Ltd.* v. *Hamence*, *supra* n. 78.

4.32 With respect to the codified grounds of review, concern was expressed that the Act might be interpreted as making the grounds of review equally applicable to *all* decisions which fall within the scope of the Act.[82] However, it has been clearly established that the application and content of, for example, the rules of natural justice remain to be determined on the particular circumstances of the case. That is, the Act does not impose any fresh obligation to observe the rules of natural justice where no such obligation exists independently of the Act.[83]

4.33 The major strength of the Australian model of reform lies in the creation of a single procedure for judicial review accompanied by a uniform, yet flexible, set of substantive principles, free from the technical distinctions attending the traditional forms of relief. The merits of a case can be considered independently of the remedy sought and, once illegality of a reviewable decision is established, the Court has the discretion to award the relief most appropriate in the circumstances.

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[81] *Compare Burns* v. *Australian National University*, *supra* n. 76; *Sellers* v. *Woods* (1982), 45 A.L.R. 113 (F.C. Aust.); *Mabey* v. *Australian Film Commission* (1984), 57 A.L.R. 583 (F.C. Aust.), rev'd (1985), 59 A.L.R. 25 (F.C. Aust., Full Court) *with Ioannou* v. *Powell* (1984), 52 A.L.R. 460 (H.C. Aust.); *Chittick* v. *Ackland* (1984), 53 A.L.R. 143 (F.C. Aust., Full Court).

[82] *See e.g.*, J. Griffiths, *supra* n. 77.

[83] *Capello* v. *Minister for Immigration and Ethnic Affairs* (1980), 49 F.L.R. 40 (F.C. Aust.); *Safadi* v. *Minister for Immigration and Ethnic Affairs* (1981), 38 A.L.R. 399 (F.C. Aust.); *Hurt* v. *Rossall* (1982), 43 A.L.R. 252 (F.C. Aust.).

4.34 However, the Australian experience demonstrates the inherent difficulty in defining by statute the nature of the activities and bodies which are subject to judicial review in administrative law. A considerable number of public law matters which, in principle, should be reviewable under the Act simply fall outside of the terms which delimit its scope.[84] It is unfortunate, as well, that the Act entrenches the judicial/administrative/legislative conundrum, particularly at a time when the courts themselves were moving away from a label-pasting approach to judicial review.[85]

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[84] It has been suggested that the failure to include decisions of a legislative nature (i.e. subordinate legislation) may have resulted from the limited terms of reference of the Kerr Committee (which was directed to examine administrative decisions) upon whose recommendations the Act was based. *See* L.J. Curtis, "Judicial Review of Administrative Acts" (1979), 53 Austl. L.J. 530.

[85] For a more in-depth review of the Australian Act, *see e.g.*, G.D.S. Taylor, "The New Administrative Law" (1977), 51 Austl. L.J. 804; J. Griffiths, *supra* n. 77; L.J. Curtis, *ibid.*; L. Katz, "Australian Federal Administrative Law Reform" (1980), 58 Can. Bar Rev. 341; G.A. Flick, *supra* n. 68; Administrative Review Council Secretariat (Australia), "Review of The Administrative Decisions (Judicial Review) Act 1977" (Issues Paper, 1984); N. Hennessy and J. Goldring, "'Administrative Character'" (1985), 59 Austl. L.J. 659.

CHAPTER 5

RECOMMENDATIONS FOR REFORM

A. GENERAL

5.01 As outlined in Chapter 3 of this Report, in the Commission's view, the major deficiencies of the present law of judicial review include the following:

(a) The structure of the present system of judicial review places undue emphasis on the remedy sought. This, in some instances, detracts from the adjudication of a case on its merits.

(b) Different procedures exist for seeking the various remedies and, as a result, the remedies are not readily available together or in the alternative in one proceeding. This puts the applicant in the unenviable position of having to weigh the relative advantages and disadvantages of the remedies before choosing which procedure to adopt, a difficult task because "the lines between remedies [are] complex and shifting, the principal concepts confusing the boundaries of each remedy [are] undefined and undefinable".[1] The plurality of procedures and remedies also increases the risk of an application being dismissed merely on procedural grounds.

(c) The substantive law which determines the availability of the remedies is complex and replete with technical distinctions amongst the remedies. Most of these distinctions serve no rational or functional purpose, and merely reflect the divergent histories and traditional procedures attending the remedies.

5.02 The Commission expresses *general* satisfaction with the present substantive law and scope of judicial review *when viewed as a whole*. That is, the present remedies *conjointly* provide the citizen with reasonably adequate redress for grievances arising from illegal administrative action, and strike a generally fair balance between the developed expertise and required efficiency of the administration on the one hand, and the role of the courts in protecting individual interests and upholding the rule of law on the other. However, in light of the deficiencies of the present law, it is our view that reform, primarily of a procedural nature but partly also of a substantive nature, is required in Manitoba. We recommend:

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[1] K.C. Davis, *Administrative Law Text* (3rd ed. 1972) 458.

RECOMMENDATION 1

That there be reform of judicial review of administrative action in Manitoba.

5.03 Procedurally, the creation of a simple method for obtaining all appropriate forms of relief in one proceeding is of primary importance. Because of the divergent interests involved in judicial review proceedings - those of the applicant, of the administration and of other citizens who may be relying on the validity of the challenged administrative act - such a procedure should be designed to facilitate the speedy and inexpensive resolution of the application without, however, sacrificing a fair presentation and adequate consideration of all the issues relevant to the case.

5.04 Insofar as it is desirable to eradicate the unnecessary distinctions which at present determine entitlement to the various remedies, an accompanying simplification and restructuring of the substantive law of judicial review is also required. Simply stated, what is advocated by the Commission is the retention, for the most part, of the general scope and substance of the present law, but the elimination of the technicalities which attend the specific forms of relief.

5.05 To implement these objectives, the Commission favours generally the third scheme of reform of judicial review in relation to administrative action discussed in the previous Chapter: the restructuring of the traditional forms of relief into a new statutory remedy. In our view, this approach most directly and completely addresses the problems attending the present pluralistic system of remedies, and provides the best means for implementing reform designed to promote the determination of a case on its merits with a minimum of attendant substantive complexities and procedural technicalities.

5.06 The merits of introducing reform through the provision of a comprehensive statutory remedy, designed without reference to the traditional remedies, include the following:

(a) Reform by way of statute, rather than rules of court, allows for changes to be made both to the substantive and to the procedural law of judicial review. The difficult procedural/substantive debate is avoided.

(b) All forms of appropriate relief would be available in a single proceeding. The applicant would need no longer to choose between the traditional remedies at the risk of having the application dismissed should he choose incorrectly.

(c) The goals of simplicity and rationality would best be served by the introduction of a statutory remedy. The unnecessary distinctions in both substance and procedure which plague the traditional forms of relief would be obviated, and replaced with uniform principles created by rational design rather than accident of history. Any useful distinctions could be preserved and deliberately incorporated into the legislative scheme.

(d) Perhaps the most significant contribution of such a system would be to change the focus in judicial review proceedings. One writer, in speaking of the Australian scheme (which exemplifies this model of reform), has stated the following:

> The focus of the existing law has been on the remedies. Judicial review has been seen as review by way of prerogative writ, injunction or declaration, and the substantive law has developed around the remedies. . . .
>
> The major step taken by the [Australian judicial review legislation] is that it has done away with the need to start from the character of the remedy sought. Of course, the effect of the remedy is still significant, but the Court is free to consider the substance of the grievance before it turns its attention to the appropriate remedy. *The focus has moved from the remedy sought or the procedure necessary to obtain that remedy to the substantive law involved . . . .*[2] [emphasis added]

5.07 We recommend:

RECOMMENDATION 2

That the reform of judicial review of administrative action involve the restructuring of the traditional forms of relief into a new statutory remedy.

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[2] L.J. Curtis, "Judicial Review of Administrative Acts" (1979), 53 Austl. L.J. 530 at 531.

RECOMMENDATION 3

That the reform of judicial review of administrative action be accomplished by primary legislation.

B. THE SCOPE OF THE NEW APPLICATION FOR REVIEW

1. General

5.08 As evidenced by our review of reform in other jurisdictions (see Chapter 4), defining the application and scope of judicial review legislation presents the reformer with a formidable challenge. In essence, what is required is a statutory formula denoting "public law or administrative law matters" as those terms are used within the context of judicial review, i.e., those activities which are subject to review by the courts upon principles of administrative law.

5.09 There are basically three criteria which may be used to delimit the realm of judicial review in administrative law:

(a) the character of the person or body against whom review is sought;

(b) the source of the authority under or pursuant to which such person or body purports to act; and

(c) the nature of the activity in respect of which review is sought.

None of these criteria is sufficient by itself; the demarcation of the ambit of judicial review involves an interplay amongst all three points of reference.

5.10 Judicial review is concerned primarily with persons and bodies of a *public* character. However, not all the activities undertaken by public authorities fall within the ambit of administrative law for the purposes of judicial review. Functions which have been variously described as "private", "commercial", "operational" or "day-to-day matters of business and administration" are not subject to judicial review (although their execution may give rise to actions in private law on the basis of tort, breach of contract, wrongful dismissal, etc.). Conversely, some of the bodies whose activities are governed by administrative law principles are not "public" in the sense of being part of the public service. Non-governmental bodies which fulfil functions of public importance (e.g. universities, discipline committee of The Law Society) and private bodies which make important decisions affecting the rights and privileges of persons (e.g. governing body of a trade union expelling a member) are also amenable in certain circumstances to the principles of administrative law.

5.11 Most administrative bodies exercise powers pursuant to *statutory* authority or regulations made thereunder. Some, however, are created and empowered by Order-in-Council, or Ministerial Order or Directive.[3] Still others have been described as constituted under the Crown prerogative.[4] Certain undertakings by administrative bodies are said to involve the exercise of contractual powers only. On the other hand, private business corporations are creatures of statute and empowered by statute, yet their activities are not within the purview of administrative law.

5.12 Judicial review is concerned with acts and decisions of an *administrative* nature, using the term broadly. Such activities have been subcategorized as "judicial", "quasi-judicial", "administrative", "executive", "ministerial" (i.e. non-discretionary) and "legislative" (i.e. the passing of by-laws and other subordinate legislation of general application). Included within these terms are functions which involve generally the exercise of authority, backed by law, to impose, prescribe or determine legal duties or liabilities; to confer, modify, affect or determine legal rights, privileges or immunities; to investigate or recommend with respect to the above matters; and to promulgate general rules of conduct. All involve the exercise of delegated[5] authority which is subject to judicial review under the doctrine of *ultra vires*. Whether a particular function will be viewed as administrative, as opposed to "private", may in turn be influenced by the character of the body executing the function and the source of authority pursuant to which the body acts.

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[3] *See e.g.*, The Manitoba Law Reform Commission, *Report on Administrative Law; Part I: Procedures of Provincial Government Agencies* (Report #58, 1984) Appendix B.

[4] *R.* v. *Criminal Injuries Compensation Board*, [1967] 2 Q.B. 864. For a criticism of the employment of the term "prerogative power" in the context of this case, *see* H.W.R. Wade, *Administrative Law* (5th ed. 1982) 214.

[5] With the exception of a direct exercise of prerogative power by the Crown.

5.13 Leaving aside for the moment domestic tribunals, we are interested in denoting the acts and decisions of

(a) governmental and other public (or "hybrid public/private") authorities;

(b) done or made under or pursuant to

  i) a statute,
  ii) a regulation, rule, order or by-law made under a statute,
  iii) an Order-in-Council,
  iv) a Ministerial Order or Directive, or
  v) a prerogative or common law power of the Crown;

(c) of a judicial, quasi-judicial, administrative, executive, ministerial or legislative (but not of a private or purely commercial) nature, involving, for example, the exercise of adjudicative, disciplinary, licensing, compensatory, investigative, regulatory or rule-making functions.

5.14 It is apparent that the demarcation of administrative law matters involves a consideration of several inter-related criteria. Judicial review may be sought in relation to myriad activities undertaken by a wide variety of persons or bodies operating under numerous sources of authority. As a result, we are of the view that the scope and application of our proposed statutory scheme of judicial review defies any precise or rigid definition. We begin, therefore, with the basic proposal that a flexible and comprehensive formula or guideline be adopted to delineate the application of the new judicial review remedy. It is our recommendation:

RECOMMENDATION 4

That the scope of the proposed judicial review legislation ("the Act") generally extend to the review of any "decision of an administrative character" made (or purported, refused or proposed to be made) which, having regard to

(a) the nature of the tribunal against which relief is sought;

(b) the source of such tribunal's authority to make the decision;

(c) the nature of the matter in respect of which review is sought; and

(d) such other factors as the Court considers relevant;

is properly the subject of the Court's supervisory jurisdiction.

RECOMMENDATION 5

That the phrase "decision of an administrative character" in Recommendation 4 be defined broadly in the Act to include the doing of any act or thing, whether in the exercise of a discretion or not, and whether characterized as judicial, quasi-judicial, administrative, legislative or otherwise.

5.15 We are aware that, in advocating the adoption of a discretionary formula, we are, to some degree, sacrificing precision and certainty in the interests of comprehensiveness and flexibility. We believe this to be, however, the lesser of two evils. The experience in other jurisdictions leads us to conclude that any attempt to legislatively define the scope of judicial review will lead to interpretational difficulties and the (perhaps inadvertent) exclusion of certain matters which should fall within the purview of the legislation. As well, we believe that a discretionary formula will provide a framework within which the courts can identify those matters which are, or are not, properly subject to judicial review, without resorting to narrow questions of statutory interpretation or a rigid categorization of functions. The courts have long been fashioning the appropriate sphere of judicial review and we trust that, if we refrain from tying their hands by adopting inflexible statutory definitions, they will continue to perform admirably this function.

5.16 Having made a general recommendation respecting the scope and application of the new statutory remedy, we shall now examine certain specific matters related thereto, which will result in the amplification and modification of our basic recommendation.

2. The Crown Prerogative

5.17 Most administrative powers are ultimately derived from statute. Some, however, have as their source the royal prerogative. The term "royal prerogative" has two usages, one narrow (attributed to Blackstone) and one wide (attributed to Dicey). In its narrow, and arguably more correct sense, it refers to legal power, not statutory in origin, which pertains to the Crown alone. In its wider sense, it refers to every power of the Crown which is not derived from statute, including those liberties and powers shared by all legal persons.[6]

5.18 According to the orthodox view, the power of the court to review executive action taken pursuant to the royal prerogative was extremely limited: the court could determine the existence and extent of the prerogative, and how far it had been superseded by statute, but could not review the propriety or manner of its exercise.[7] Recent authority suggests, however, that actions of a tribunal set up under the prerogative, as well as direct exercises of prerogative power, are just as amenable to judicial review as are actions taken pursuant to statutory authority,[8] provided, of course, that the issue raised is justiciable. The advent of the *Canadian Charter of Rights and Freedoms*, which has been held to apply to the exercise of prerogative power by Cabinet, also expands the scope of review of prerogative powers.[9]

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[6] The narrow usage was adopted in *Attorney General of the Province of Quebec* v. *Labrecque*, [1980] 2 S.C.R. 1057 at 1082. For a more in-depth discussion of the royal prerogative, *see e.g.*, B.S. Markesinis, "The Royal Prerogative Re-Visited" (1973), 32 Camb. L.J. 287; G. Winterton, "Parliamentary Supremacy and the Judiciary" (1981), 97 Law Q. Rev. 265 at 268; H.W.R. Wade, *supra* n. 4, at 213; H.W.R. Wade, "Procedure and Prerogative in Public Law" (1985), 101 Law Q. Rev. 180; S. Lee, "GCHQ: Prerogative and Public Law Principles", [1985] Pub. L. 186.

[7] *de Smith's Judicial Review of Administrative Action* (4th ed. J.M. Evans 1980) (hereinafter referred to as "*de Smith*") 286; *Laker Airways Ltd.* v. *Department of Trade*, [1976] 3 W.L.R. 537 at 567 (Q.B.D.), aff'd [1977] 2 W.L.R. 234 (C.A.); *Re Doctors Hospital and Minister of Health* (1976), 12 O.R. (2d) 164 (Div. Ct.).

[8] *R.* v. *Criminal Injuries Compensation Board*, *supra* n. 4; *Laker Airways Ltd.* v. *Department of Trade*, *id.* (C.A.), per Lord Denning M.R.; *Council of Civil Service Unions* v. *Minister for the Civil Service*, [1984] 3 W.L.R. 1174 (H.L.).

[9] *Operation Dismantle Inc.* v. *The Queen* (1985), 18 D.L.R. (4th) 481 (S.C.C.), aff'g (1983), 3 D.L.R. (4th) 193 (F.C.A.).

5.19 We agree with the principle that administrative powers, whether derived from statute or from common law, are equally amenable to judicial review. Because of the subject matter to which most prerogative powers relate, we do not anticipate that many cases of the courts reviewing their exercise will arise. However, for the sake of completeness, the proposed judicial review legislation should encompass the review, in appropriate circumstances, of a direct or delegated exercise of the Crown's common law or prerogative powers.[10] The discretionary formula which we recommended be used to delimit the scope of the proposed legislation is capable of including the review of such powers.

3. Criminal and 'Quasi-Criminal' Proceedings

5.20 In principle, we would view it desirable to have a uniform procedure for judicial review in both criminal and civil proceedings. However, the procedure to be followed in criminal proceedings is within the exclusive competence of federal Parliament. Accordingly, the provincial Legislature has no jurisdiction to pass legislation in relation to the judicial review of criminal matters.

5.21 By virtue of paragraph 438(2)(c) of the *Criminal Code*, Parliament has delegated to the superior courts of criminal jurisdiction the power to make rules of court regulating the practice and procedure with respect to mandamus, certiorari, *habeas corpus* and prohibition in criminal matters. While the superior courts in several provinces (including Alberta, British Columbia, Nova Scotia and Ontario) have developed rules regulating judicial review in criminal proceedings, the Court of Queen's Bench in Manitoba has passed no such rules. In their absence, it would be expected that the common law procedure by way of application for writ would apply.[11] However, the established practice in Manitoba appears to follow by analogy the practice in civil matters. That is, applications by way of originating notice are brought for *orders* of certiorari, mandamus or prohibition.[12] In the case of certiorari, the 'one-step' procedure is followed in both criminal and civil proceedings.[13]

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[10] We note with interest that a similar proposal has been made regarding judicial review by the Federal Court of prerogative powers exercised by the federal Crown. *See* Department of Justice (Canada), *Proposals to Amend the Federal Court Act* (August, 1983) §26(ii).

[11] *See R.* v. *Dubois* (1982), 18 Man. R. (2d) 90 (C.A.), per O'Sullivan J.A. (in dissent), aff'd (1986), 26 D.L.R. (4th) 481 (S.C.C.).

5.22 Regard should be had to Part XXIII of the *Criminal Code* which deals with the extraordinary remedies in criminal proceedings. In particular, section 710 addresses the relationship between certiorari and statutory appeals.[14] Sections 711, 712, 715 and 716 deal with the unavailability of certiorari for certain technical defects or irregularities.

5.23 As mentioned previously, the provincial Legislature has no jurisdiction to regulate judicial review in criminal proceedings. Accordingly, our proposed legislation will not apply to criminal matters.[15]

5.24 The situation with respect to the review of proceedings related to provincial offences ("quasi-criminal" matters) is somewhat more complex. *The*

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[12] The Queen's Bench Rules (hereinafter noted as "Q.B.R."), r. 556 and r. 557. Note that *The Queen's Bench Act*, C.C.S.M. c. C280 (hereinafter noted as "Q.B.A."), s. 106 and Q.B.R., r. 2 expressly state that they do not affect practice and procedure in criminal matters. *But see* Q.B.A., s. 104(2) and Q.B.R., r. 1(2) which provide that the practice and procedure in all matters not provided for in the Act or Rules shall be regulated by analogy thereto.

[13] The practice was approved by the majority of the Court of Appeal in *R. v. Dubois*, *supra* n. 11. *But see* Form 86 of the Q.B.R. which appears to contemplate a two-stage proceeding for certiorari applications.

[14] Regarding the application of this section, *see Sanders* v. *The Queen*, [1970] S.C.R. 109; *R.* v. *Beaupre* (1981), 12 Man. R. (2d) 238 (C.A.).

[15] Similarly, the judicial review legislation in Ontario and British Columbia does not apply to proceedings involving offences under criminal or other federal enactments. *See e.g.*, *Re Regina and Nimbus News Dealers and Distributors Ltd.*, [1972] 3 O.R. 293 (Div. Ct.); *Re C.F.R.B. Ltd. and Attorney-General of Canada (No. 1)*, [1973] 1 O.R. 57 (Div. Ct.); *Re PPC Industries Canada Ltd. and Attorney-General of Canada* (1983), 146 D.L.R. (3d) 261 (B.C.C.A.), leave to appeal to the Supreme Court of Canada granted March 21, 1983.

Queen's Bench Act and Rules, *The Summary Convictions Act*[16] and the *Criminal Code* must all be considered.

5.25 Orders for prohibition and mandamus are governed by Queen's Bench Rules 556 to 559.[17] Section 95 of *The Queen's Bench Act* provides for a statutory motion to quash a conviction, order or warrant in lieu of certiorari in relation to proceedings involving provincial offences.[18] This statutory motion is subject to a six-month limitation period and the entering of a recognizance by the applicant.[19]

5.26 Sections 25 and 26 of *The Summary Convictions Act* contain special provisions governing motions to quash with respect to provincial offences. As well, subsection 3(1) of the Act incorporates by reference certain sections of the *Criminal Code* relating to judicial review.[20]

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[16] *The Summary Convictions Act*, C.C.S.M. c. S230.

[17] Offences under provincial laws and municipal by-laws are not "criminal matters" within the meaning of Q.B.A., s. 106 and Q.B.R., r. 2 which render the Act and Rules inapplicable to "criminal matters". *See The Copeland-Chatterson Co., Ltd.* v. *Business Systems Co., Ltd.* (1908), 16 O.L.R. 481 (C.A.).

[18] *R.* v. *Paulowich*, [1940] 1 W.W.R. 537 (Man. C.A.); *Briardale Investments Ltd.* v. *The Queen* (1964), 50 W.W.R. 517 (Man. Q.B.); *Re Manitoba Labour Relations Act, Retail Store Employees Local Union No. 832 and Creamette Co. of Canada Limited* (1955), 63 Man. R. 424 (Q.B.); *Re Mid-West By-Products Co. and Clean Environment Commission* (1979), 102 D.L.R. (3d) 208 (Man. Q.B.).

[19] Q.B.A., s. 95(7).

[20] The reference to certiorari in section 25 of the Act as well as the incorporation of the *Criminal Code* provisions respecting certiorari appear technically anomalous in light of the fact that Q.B.A., s. 95 substitutes for certiorari a statutory motion to quash in relation to provincial offences.

5.27 Absent a provision to the contrary, our proposed judicial review legislation would apply to the review of inferior court proceedings involving provincial offences. We do not view this as desirable at present. Insofar as *The Summary Convictions Act*, *The Queen's Bench Act* and the *Criminal Code* contain special provisions applicable to the judicial review of quasi-criminal matters, we hesitate to interfere. In some respects, our proposed legislation would be inconsistent with these special provisions. Furthermore, as our proposals cannot affect judicial review in relation to federal offences, to include the review of provincial offences would have the undesirable effect of making less uniform the practice in criminal and quasi-criminal proceedings.[21] Accordingly, we recommend that our proposed judicial review legislation be made inapplicable to the review of matters arising in inferior court proceedings in relation to offences under provincial or municipal law.[22]

5.28 We recommend:

RECOMMENDATION 6

That the Act expressly exclude from its scope the review of matters arising in inferior court proceedings in relation to offences under provincial or municipal law.

4. Investigations, Recommendations and Other Non-final Decisions

5.29 As noted earlier in this Report,[23] administrative authorities may, in some circumstances, have their activities reviewed by the courts in judicial review proceedings, even if their activities are confined to investigating, reporting or recommending prior to the final disposition of a matter. Several jurisdictions have expressly included within the scope of their judicial review legislation, functions of an investigative or recommendatory nature.[24] We are of the view that such matters should be brought within the ambit of our proposed legislation. It may not be obvious, however, that a "decision", within the terms of our proposals, includes such preliminary activity.[25] Accordingly, we recommend:

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[21] This is not to suggest that reform of judicial review in relation to provincial offences is not required, nor that it would be undesirable to have rules governing review in relation to federal offences.

[22] Note that the Ontario *Judicial Review Procedure Act* does not apply to review respecting provincial offences by virtue of the *Provincial Offences Act*, R.S.O. 1980, c. 400, s. 124 to s. 126 (first enacted S.O. 1979, c. 4). For the confusing situation prior to 1979, *see Re Beke and The Queen* (1977), 15 O.R. (2d) 603 (Div. Ct.).

[23] *See* §2.47, *supra*, and authorities referred to therein.

RECOMMENDATION 7

That the Act expressly include within its scope the review, in appropriate circumstances, of inquiries or investigations and the making of reports or recommendations.

5.30 We have considered whether it is necessary or desirable to include within the definition of a "decision" reviewable under the proposed Act an interim or intermediate determination made in the course of the decision-making process (e.g. a ruling made during a hearing respecting the admissibility of evidence or the granting of an adjournment).[26] We see no need expressly to provide for the review of such determinations. Should a particular intermediate ruling result in a denial of natural justice or other jurisdictional error, review proceedings could be brought on the basis of loss of authority to proceed with the making of the final decision.[27] Similarly, should an improper interim ruling result in an unlawful refusal by the tribunal to exercise further its authority, an order could be sought requiring the tribunal to proceed with its decision-making process. Finally, the prospective applicant could wait for the ultimate decision to be made and then apply to have the decision set aside on the basis of the interlocutory error. Accordingly, we do not view it as necessary to provide for the review of interim determinations *per se*.

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[24] NZ, s. 3; BC, s. 1; Aust, s. 3(3); Barb, s. 2. *See also* LRCC, Recommendation 5.3.

[25] We note *Re Doyle and Restrictive Trade Practices Commission* (1984), 6 D.L.R. (4th) 407 (F.C.A.) where the issue arose as to whether a report constituted a "decision" within the terms of Can, s. 28.

[26] Questions in relation to the review of interim decisions have arisen under the Australian judicial review legislation as well as the Canadian federal legislation. *See* §4.28, *supra*, and authorities referred to therein.

[27] *See* Recommendations 11 and 16 respecting the grounds of review and relief available under the proposed judicial review remedy.

5.31 We note, parenthetically, that a tribunal is not obliged to discontinue its proceedings merely because an application for judicial review has been filed. Should the applicant seek an order of the court staying the administrative proceedings pending the determination of the review application, the court could refuse a stay if the review proceedings have been brought prematurely or appear to have been instituted merely as a delaying tactic.

5. Decisions Made By Internal Committees

5.32 Earlier in our Report,[28] we commented upon the failure of judicial review Acts in other jurisdictions to capture within their ambit decisions or recommendations made by internal committees, informally set up by a public official, which were not themselves creatures of statute. Review of the activities of such committees was held by the courts to be precluded because the committees were not exercising "statutory powers" or making decisions "under an enactment", even though they played an integral role in a decision-making process which culminated in the making of a statutory decision by the delegating official.

5.33 The scope of our proposed legislation is not delimited by reference to the exercise of powers under a statute or enactment. Accordingly, we do not anticipate this restriction developing under our proposed legislation; the court would not be prevented from reviewing, in appropriate circumstances, functions delegated internally by an administrative authority. The court would be able to review, for example, the recommendations (or a decision based upon the recommendations) of an internal non-statutory committee where a breach of natural justice by the committee vitiated the whole decision-making process.

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[28] *See* footnotes 33 and 78 in Chapter 4 and accompanying text.

6. Relationship to the *Federal Court Act*

5.34 The Federal Court of Canada has virtually exclusive jurisdiction to review the acts and decisions of any "federal board, commission or other tribunal",[29] which is defined as:

> any body or any person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of the Parliament of Canada, other than any such body constituted or established by or under a law of a province or any such person or persons appointed under or in accordance with a law of a province or under section 96 of the *Constitution Act, 1867*.[30]

This delimiting term has been widely interpreted so as to include not only agencies, but all federal statutory decision-makers. Because the Federal Court's jurisdiction is almost exclusive, the decisions of such persons and bodies will generally not be reviewable under our proposed provincial legislation.

5.35 Two points must be noted, however. Where review of a federal board's act or decision is based on a challenge to the constitutional validity of the board's empowering legislation or to the constitutional applicability of the legislation in the particular circumstances, the provincial superior courts do have jurisdiction to adjudicate the matter.[31] It should also be emphasized

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[29] Can, s. 18 and s. 28(1). The Federal Court is not empowered, however, to issue a writ of *habeas corpus* against such tribunals. This remedy continues to be available from the provincial superior courts.

[30] Can, s. 2, as am. by the *Constitution Act, 1982*, s. 53(2).

[31] *The Attorney General of Canada* v. *The Law Society of British Columbia*; *Jabour* v. *The Law Society of British Columbia*, [1982] 2 S.C.R. 307;

(Footnote continued to page 98)

that the Federal Court's review jurisdiction does not extend to *provincial* bodies exercising powers under federal statutes;[32] review of the activities of such bodies remains with the provincial superior courts.[33]

5.36 Our proposed legislation should be broad enough to encompass an exercise of federal power, the review of which is not assigned exclusively to the Federal Court.

C. STANDING TO INSTITUTE JUDICIAL REVIEW PROCEEDINGS

1. General Principles

5.37 The existing law as to the entitlement of a person to seek judicial review is unsatisfactory. Different rules of standing pertain to the various remedies, and the individual rules are in a state of uncertainty. Furthermore, the issue of *locus standi* is sometimes confused with the issue of justiciability.[34]

(Footnote continued from page 97)
Canada Labour Relations Board v. *Paul L'Anglais Inc.* (1983), 146 D.L.R. (3d) 202 (S.C.C.); *Re Brink's Canada Ltd. and Canada Labour Relations Board* (1985), 17 D.L.R. (4th) 331 (F.C., T.D.). *Cf. Pecheries MPQ Ltee* v. *Hache* (1986), 25 D.L.R. (4th) 66 (N.B.Q.B.).

[32] Note the proviso in the definition of "federal board, commission or other tribunal", Can, s. 2.

[33] *Canadian Pacific Transport Company Limited* v. *Highway Traffic Board*, [1976] 5 W.W.R. 541 (Sask. C.A.); *Re Abel, and Director, Penetanguishene Mental Health Centre* (1979), 24 O.R. (2d) 279 (Div. Ct.), aff'd (1980), 31 O.R. (2d) 520 (C.A.); *Carruthers* v. *Therapeutic Abortion Committees of Lions Gate Hospital* (1983), 6 D.L.R. (4th) 57 (F.C.A.). *See also Re Bicknell Freighters Ltd. and Highway Transport Board of Manitoba* (1977), 77 D.L.R. (3d) 417 (Man. C.A.). *Compare Re Abel, above, with Re Lingley and Hickman* (1972), 33 D.L.R. (3d) 593 (F.C., T.D.).

[34] We agree with the proposition that "[t]he law would gain in clarity and rationality if issues of standing were clearly separated from issues of justiciability" (P. Cane, "The Function of Standing Rules in Administrative
(Footnote continued to page 99)

5.38 Most commentators agree that the existence of different tests of standing for different remedies, largely a product of separate historical developments, is at present without justification.[35]

> . . . [I]t is a defect in administrative law that the various remedies should have differing rules as to standing. In a fully logical system there should be only one rule as to standing, which should be unaffected by the nature of the remedy which the court may ultimately award.[36]

The Commission agrees that there exists no compelling reason to retain divergent rules of standing for the various forms of relief when employed as remedies in an administrative law context. The development of a uniform test of *locus standi* is desirable, and consistent with the goal of simplifying and unifying the procedure for judicial review. We recommend:

RECOMMENDATION 8

That the Act contain a uniform provision regarding standing or entitlement to apply for judicial review.

5.39 Before reaching a decision as to what the rule of standing ought to be, an underlying philosophy respecting the function of administrative law remedies and the role of the court in judicial review proceedings must be adopted. Two competing theories emerge, one calling for a restricted view of

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(Footnote continued from page 98)
Law", [1980] Pub. L. 303 at 312. *See also* S. Chester, "Holy Joe and the Most Vexed Question - Standing to Sue and the Supreme Court of Canada" (1983), 5 Supreme Court L.R. 289). If a matter is not justiciable, i.e., not suitable for the court's determination, it should be dismissed on that preliminary basis rather than by reference to the personal status of the applicant.

[35] *See e.g.*, D. J. Mullan, "Reform of Administrative Law Remedies - Method or Madness?" (1975), 6 Fed. L. Rev. 340 at 358; Public and Administrative Law Reform Committee (New Zealand), *Standing in Administrative Law* (11th Report, 1978); J.A. Smillie, "Locus Standi - The Report of the Public and Administrative Law Reform Committee" (1978), 4 Otago L. Rev. 141; P. Cane, *id.*, at 326.

[36] H.W.R. Wade, *Administrative Law* (4th ed. 1977) 546.

locus standi, the other for a liberalization or, indeed, abolition of the rules of standing.

5.40 The narrow approach emphasizes the court's role as a protector of private rights, and adopts a dispute-settling model for judicial review.

> It is accepted, I believe, that the primary role of judicial review is the protection of interests specially affected by allegedly illegal official action; its articulation for this purpose has been highly developed by the courts.[37]

> [Courts] are dispute-resolving tribunals, established to determine contested rights or claims between or against persons . . . .[38]

If the primary aim of the judicial system in review proceedings is to protect individual rights, the court's concern with lawful administration arguably is limited to the extent that individual rights or interests are infringed. A person seeking judicial review, therefore, must demonstrate some personal interest before invoking the supervisory jurisdiction of the court.

5.41 The broader approach emphasizes the court's function of upholding the rule of law and preserving legal order by confining the executive branch of government to a lawful exercise of its powers.

> Restrictive rules about standing are in general inimical to a healthy system of administrative law. If a plaintiff with a good case is turned away merely because he is not sufficiently affected personally, that means that some government agency is left free to violate the law, and that is contrary to the public interest.[39]

> In the face of ever-increasing government regulation of private action, the only legal protection available to the private citizen

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[37] L.L. Jaffe, *Judicial Control of Administrative Action* (1965) 459.

[38] *The Minister of Justice of Canada* v. *Borowski*, [1981] 2 S.C.R. 575 at 579, per Laskin C.J.C. in dissent.

[39] B. Schwartz and H.W.R. Wade, *Legal Control of Government* (1972) 291.

> against arbitrary, oppressive or misguided use of governmental power lies in his ability to enlist the aid of the courts to compel administrators to comply with the restrictions imposed by Parliament to limit the scope of their discretions. To the extent that restrictive rules of locus standi reduce the opportunities for judicial enforcement of legislative checks upon administrative discretion, they insulate the administration from judicial supervision and increase its effective power. To the extent that liberal standing requirements increase the likelihood of unlawful governmental action being successfully challenged in court, they operate as a deterrent against administrative illegality and enhance the prospects of lawful and accountable government.[40]

> It would . . . be a grave lacuna in our system of public law if a pressure group . . . or even a single public-spirited taxpayer, were prevented by outdated technical rules of locus standi from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped.[41]

By focusing on the court's role as arbiter of what is legal and illegal, one can view restrictive *locus standi* requirements as impeding the judicial function. A citizen's general interest in administrative legality[42] should be sufficient to set the judicial machinery in motion.

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[40] J.A. Smillie, *supra* n. 35, at 145. These comments merit qualification in that recourse to the courts cannot be said to be the "only" legal protection available to the private citizen in Manitoba; an aggrieved citizen may also enlist the aid of the Ombudsman.

[41] Lord Diplock in *Inland Revenue Commissioners* v. *National Federation of Self-Employed and Small Businesses Ltd.*, [1981] 2 W.L.R. 722 at 740 (H.L.).

[42] Analogous to "the right of the citizenry to constitutional behaviour by Parliament", recognized by the Supreme Court of Canada in *Thorson v. Attorney-General of Canada (No. 2)* (1974), 43 D.L.R. (3d) 1 at 19 (S.C.C.), cited in *The Minister of Justice of Canada* v. *Borowski*, *supra* n. 38, at 593.

5.42 The following guideline was endorsed by the law reform agencies in England[43] and British Columbia[44] when making proposals for the reform of remedies in administrative law:

> The remedies' primary object is not to assert private rights, but to have illegal public actions and orders controlled by the courts.

We agree that the role of the remedies in controlling illegal public action is of great importance, but prefer to frame an appropriate guideline for making our proposals for reform as follows:

> The object of judicial review is not only to protect individual rights and interests from unauthorized administrative interference, but also more generally to ensure that public powers are exercised within their legal limits.

We are of the view, therefore, that the element of public interest in lawful administration should be recognized in any proposed rule of standing.

5.43 A brief examination of the concept of "public interest" is in order. In part, as discussed above, it refers to the interest that all citizens may be said to have in governmental and other public powers being exercised according to law. It is a question of some jurisprudential nicety whether this interest in administrative legality (or legislative constitutionality) is best viewed as vesting in each individual member of the public or as vesting in "the public" at large. In the first case, the "public interest litigant" may be viewed as vindicating his own interest, which is shared by others; in the second, he may be viewed as a representative of the public seeking to vindicate *its* interest in administrative legality. The idea of a litigant pursuing his own interest, whether shared by others or not, is not particularly startling. However, it may be questioned whether a private individual, with no public mandate, could possibly claim to represent the public as a whole.

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[43] The Law Commission (England), "Remedies in Administrative Law" (Working Paper No. 40, 1971) 56.

[44] Law Reform Commission of British Columbia, *Report on Civil Rights, Part IV - A Procedure for Judicial Review of the Actions of Statutory Agencies* (Report No. 18, 1974) 26.

5.44 We will not attempt to engage in a philosophical analysis of the nature of individual versus public rights and interests. We are of the view, however, that issues of administrative legality involve elements of *both* public and private dimension. Accordingly, we see no objection, in principle, to permitting a private citizen to institute judicial review proceedings on the basis of his own interest in the lawful exercise of public power. We will be returning to this issue when we examine the present role of the Attorney-General as the protector of the public interest later in this Chapter.

5.45 Another point is perhaps worthy of emphasis. Administrative bodies deal with matters of public significance such as labour relations, the environment and the marketing of agricultural produce, to mention only a few. This brings us to a second level of the concept of "public interest" - interest in the subject matter of administrative decisions and proceedings. In this respect, there is no unitary public interest and no monolithic public. Interests will vary amongst management and labour, environmentalists and industrialists, farmers and consumers. It makes no sense to speak of *the* public interest, only various aspects and shades thereof.

5.46 The "public interest litigant" will most often be motivated by his interest in the subject matter of the impugned administrative decision, rather than by his more abstract interest in administrative legality *per se*. In judicial review proceedings, however, these two interests will coincide and merge. The issue before the court will not be whether the administrative decision was desirable as a matter of policy; it will be whether the decision was valid as a matter of law.

2. Arguments Against Liberalization

5.47 The Commission is not unmindful of the oft-advanced arguments against liberal rules of standing, but we find these arguments generally unpersuasive.

(a) Opening the floodgates

5.48 Concern has been expressed that a relaxation of standing requirements would result in the courts being inundated by a flood of litigation. Courts have only limited resources, and public authorities should not be plagued with the cost and inconvenience of a constant stream of court proceedings.

> If every taxpayer could bring an action to test the validity of a statute [or, presumably, the legality of an administrative act] . . . it would in my view lead to grave inconvenience and public disorder.[45]

One commentator has referred to this concern as "the sterile and hackneyed 'floodgates' argument, that hobgoblin of some judicial minds, the fear that too many people will approach the court seeking justice!"[46]

5.49 The floodgates argument can be discounted for several reasons. First, as noted by the Public and Administrative Law Reform Committee,[47] wide standing rules in particular statutes or in other jurisdictions or contexts have not resulted in a spate of litigation. Secondly, it is unreal to assume "the existence of a shoal of officious busybodies agitatedly waiting, behind 'the flood-gates', for the opportunity to institute costly litigation in which they have no legitimate interest."[48] Thirdly, the doctrine of *stare decisis* would discourage a multiplicity of proceedings with respect to the same issue. Fourthly, insofar as this argument contemplates a flood of *unmeritorious* claims, the courts already have extensive powers for dealing with frivolous or vexatious proceedings.

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[45] *Thorson* v. *Attorney-General of Canada (No. 2)* (1971), 22 D.L.R. (3d) 274 at 278 (Ont. H.C.), aff'd (1972), 25 D.L.R. (3d) 400 (Ont. C.A.), rev'd (1974), 43 D.L.R. (3d) 1 (S.C.C.), echoing the sentiments of Duff J. (as he then was) in *Smith* v. *The Attorney General of Ontario*, [1924] S.C.R. 331.

[46] J.M. Johnson, "*Locus Standi* in Constitutional Cases After Thorson", [1975] Pub. L. 137 at 152.

[47] *Supra* n. 35, at 5-6. *See also* The Law Reform Commission (Australia), *Standing in Public Interest Litigation* (Report No. 27, 1985) 106-110; The Law Reform Commission of Western Australia, "Working Paper on The Judicial Review of Administrative Decisions" (Project No. 26 - Part II, 1981) 90-91; A.J. Roman, "The Law of Standing and The Public Interest" (Unpublished Paper prepared for The Law Reform Commission of Ontario, 1981) 26.

[48] Deane J. in *Phelps* v. *Western Mining Corp. Ltd.* (1978), 20 A.L.R. 183 at 189 (F.C. Aust., Full Court). *See also* I. Zamir, *The Declaratory Judgment* (1962) 272.

5.50 Laskin, J. (as he then was), in *Thorson*, was unimpressed by the floodgates argument and dismissed it thus:

> I do not think that anything is added to the reasons for denying standing, if otherwise cogent, by reference to grave inconvenience and public disorder. . . . The Courts are quite able to control declaratory actions, both through discretion, by directing a stay, and by imposing costs; and as a matter of experience, *MacIlreith* v. *Hart* . . . does not seem to have spawned any inordinate number of ratepayer's actions to challenge the legality of municipal expenditures.[49]

(b) Separation of powers

5.51 It is sometimes suggested that restrictions on standing serve to restrain the courts from encroaching on the powers of the executive and legislative branches of government. To allow a person with no particular personal grievance to challenge administrative action is to lead the court away from its traditional adjudicative role and turn it into a second-tier administrative decision-maker.[50]

5.52 The Commission finds such an argument unconvincing, and adopts the following in reply:

> Standing rules should not be used as a mechanism for restricting the activities of the courts to adjudication and for preserving to the administration and the legislature the role of weighing competing interests in society. . . . A doctrine of justiciability and the

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[49] *Supra* n. 42, at 6-7, adopted by the Manitoba Court of Appeal in *Stein* v. *City of Winnipeg* (1974), 48 D.L.R. (3d) 223 at 236 (Man. C.A.).

[50] *See* P.C. Weiler, "Of Judges and Scholars: Reflections in a Centennial Year" (1975), 53 Can. Bar Rev. 563; Burger C.J. in *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208 at 222 (1974).

grounds of *ultra vires* are better mechanisms for keeping the courts within what is perceived to be their proper constitutional sphere of activity.[51]

(c) The proper plaintiff

5.53 Insofar as it is argued that only an applicant with some personal interest at stake will competently and thoroughly argue a case, the 'proper plaintiff' argument also is unconvincing.

> Such contention . . . ignores the fact that many public interest litigants are similarly committed to their cause, and will fight for it just as vehemently and will prepare for its presentation just as, if not more, meticulously as private litigants.[52]

At the very least, financial investment in the litigation, if not ideological commitment to the case, should ensure serious and proper presentation.

5.54 There is one respect, however, in which the 'proper plaintiff' argument does merit serious consideration. In situations where one party is more affected than other members of the public, should persons other than that party be entitled to seek relief in judicial review proceedings?[53]

5.55 This issue is exemplified in a case in which a parents' association challenged the dismissal of a school principal, citing violations of natural justice.[54] It may be questioned whether the parents' association should have

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[51] P. Cane, *supra* n. 34, at 327.

[52] D.L. Haskett, "Locus Standi and the Public Interest" (1981), 4 Can.-U.S. L.J. 39 at 42.

[53] This issue has been raised by the Public and Administrative Law Reform Committee, *supra* n. 35, at 7-9; Laskin C.J.C. in *The Minister of Justice of Canada* v. *Borowski*, *supra* n. 38.

[54] *Re Ratepayers of the School District of the New Ross Consolidated School*

(Footnote continued to page 107)

been recognized as having standing, given that the principal - the party most directly affected - chose not to challenge the decision to dismiss.

5.56 It is at this point that one must proceed with caution in giving general effect to the public interest in administrative legality. Some administrative law cases involve "individualized decision-making" and approximate very closely private claims.

> Not all administrative law cases raise the same public issues as is generally the case with challenges to the constitutionality of legislation or the legality of other kinds of government action.
>
> . . . .
>
> . . . *Borowski* should not be seen as approving public interest challenges whenever a question of legality is raised in relation to public authority activity.[55]

5.57 It has been most cogently argued that

> . . . there are situations where the dispute in question is so nearly approximate to private law litigation as to lead the court as a matter of discretion to deny standing to members of the public at large. In other words, while the broad standing principles of *Thorson*, *McNeil* and *Borowski* should generally apply to all forms of public law litigation, we would add as a consideration to be taken into account the fact that the action complained of by a public

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(Footnote continued from page 106)
and Chester and District Municipal School Board (1979), 102 D.L.R. (3d) 486 (N.S.S.C., T.D.). *See* the comments respecting this case in D.J. Mullan, "Standing: The Relevance of the Constitutional Cases to Administrative Law" in *Isaac Pitblado Lectures on Advocacy: Rights and Remedies - New Developments* (1983) 172.

[55] D.J. Mullan and A.J. Roman, "*Minister of Justice of Canada* v. *Borowski*: The Extent of the Citizen's Right to Litigate the Lawfulness of Government Action" (1984), 4 Windsor Yearb. Access Justice 303 at 340-341.

> interest litigant was aimed at a particular private individual or group which has chosen not to seek relief. This means that there will be public law situations where the combination of a respect for private autonomy in the rejection of judicial assistance and the absence of a major public impact resulting from the decision underchallenge [sic] would lead to a denial of standing to those not the direct object of the decision.[56]

5.58 The learned authors above-quoted have aptly presented a matter which has also concerned the members of the Commission. We believe, however, that when considering the instigation of judicial review proceedings in relation to administrative activity which affects primarily one person or group of persons, care must be taken to distinguish between two different situations. The first arises where the applicant is *also* personally and significantly affected by the impugned administrative action, albeit not as directly affected as the 'primarily affected person or group of persons'. The second arises where the applicant (who is again not the 'primarily affected person') institutes judicial review proceedings solely on the basis of his interest as a member of the public. Bearing in mind this distinction, we agree that the public interest in lawful administration should not be allowed to overshadow entirely the private interests in judicial review proceedings in the administrative law context; a balance must somehow be achieved in any proposed rule of *locus standi*.

(d) The role of the Attorney-General as protector of the public interest

5.59 As discussed earlier in this Report, at present in cases where individuals lack standing to institute public interest proceedings, application may be made to the Attorney-General for his consent to relator proceedings.[57] The Attorney-General's power to refuse such application, in effect, gives him control over whether proceedings to review illegal administrative action will reach the courts in those cases where individuals lack *locus standi*.

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[56] D.J. Mullan and A.J. Roman, *id.*, at 349. (The "broad standing principles of *Thorson, McNeil* and *Borowski*", referred to in the quote, were canvassed earlier in §§2.83-2.87 of this Report.) For an example of an administrative law case in which this type of reasoning was instrumental in the court's refusal to grant relief sought by the Attorney-General, acting as representative of the public interest, *see PPG Industries Canada Ltd.* v. *The Attorney General of Canada*, [1976] 2 S.C.R. 739 at 749-750.

5.60 An expansion of the rules regulating the standing of individuals necessarily reflects upon the Attorney-General's traditional role as the proper plaintiff (either *ex proprio motu* or *ex relatione*) in actions regarding violations of public rights. Some would argue against a relaxation of standing rules, contending that the Attorney-General is the only appropriate applicant to vindicate the public interest.

5.61 Does the Attorney-General's traditional role as guardian of the public interest provide a basis for denying standing in judicial review proceedings to individual "public interest litigants"?

5.62 First, it is to be recalled that the role of the Attorney-General has been emphasized only in relation to injunctive and declaratory proceedings, apparently by way of an extension of the principles developed in the field of public nuisance. With respect to the prerogative orders, it has long been suggested that "anyone" can apply for the remedies. The exclusive role of the

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[57] The Attorney-General's Department in Manitoba has indicated that in the past fifteen years, there have been only approximately six requests for the Attorney-General's consent to relator proceedings (letter from Director of Civil Litigation, Department of the Attorney-General to J. Tokar, Manitoba Law Reform Commission, February 8, 1983; letter from Crown Counsel, J.G. Donald, to D.J. Miller, Manitoba Law Reform Commission, December 17, 1985). Four such applications were made by municipalities with respect to the abatement of a public nuisance. The fifth application was presented by a group of residents seeking an injunction to prevent a public bus from travelling down their street. It was refused. The sixth was an application by an association which alleged a public nuisance arising from the operation of an abortion clinic. This application was also refused.

It appears that the relator proceeding has not been widely used recently in Manitoba. The reason for such few applications is a matter of speculation, although the Manitoba courts' generous approach to individual standing may, in part, account for this situation.

Attorney-General, therefore, has not historically permeated the whole of administrative law.

5.63 Secondly, we noted earlier that questions of administrative legality may be viewed as having both a public and a private dimension. It may be that the Attorney-General, as an elected official, has a better claim to representing the interests of the public at large than does a private individual. However, it does not follow that a private individual should be precluded from pursuing his own interest, as a member of the public, in administrative legality.

5.64 We noted earlier as well that the public interest in the subject matter of administrative proceedings is not unitary and indivisible. The Attorney-General may well represent the interests of a *segment* of the public when he chooses to exercise his right of standing to challenge administrative proceedings. However, what of situations where the Attorney-General's view of the public interest (whether influenced by political considerations, personal values or the opinion of the majority of the electorate) leads him to refrain from instituting review proceedings? Should this prevent others, who are motivated by a different view of the public interest, from challenging administrative activity which is alleged to be unlawful?

5.65 The Attorney-General's role as instigator of civil proceedings in the public interest has met with some criticism. Particularly with respect to constitutional challenges, it has been pointed out that the Attorney-General is put in the incongruous position of being asked to challenge the validity of legislation which it is his duty to enforce.[58] Similarly, criticism has been levied at the Attorney-General's role in proceedings involving allegedly illegal administrative acts of his own government.[59] His dual role as a member of the Cabinet and the guardian of public rights is a delicate one.

> One of the main reasons normally advanced for the rigidity of the standing requirements where public rights were involved was the

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[58] J.M. Johnson, *supra* n. 46, at 144-146; *see also* Laskin J. (as he then was) in *Thorson*, *supra* n. 42, at 7.

[59] I. Zamir, *supra* n. 48, at 273-275.

> constitutional position of the Attorney-General as the protector of the public interest and thus the appropriate person to initiate litigation in such cases. This traditional role, however, is one that bears little relationship to reality, particularly where the legislation concerned or the decision in issue has been initiated by the government of which the Attorney-General is a member or where the matters complained of relate to the actions of Ministers of the Crown, government departments or agencies, or government-appointed tribunals. The practicalities of partisan politics and the ambivalence of his position as both a member of the Cabinet and a Law Officer of the Crown have virtually eliminated this function of the Attorney-General.[60]

5.66 In light of these concerns, it is not clear that the Attorney-General is the only party who should be permitted to bring legal issues of public significance before the court for resolution; there is a legitimate role to be played by the private "public interest litigant" as well. However, the Commission views it as desirable that the Attorney-General continue to have an opportunity to participate in such public interest suits, particularly to ensure a presentation of broader interests to the court. Our specific recommendations respecting the role of the Attorney-General appear later in this Chapter.

3. Proposed Rules of Standing

5.67 It was earlier proposed that the following guideline be adopted with respect to standing for judicial review:

> The object of judicial review is not only to protect individual rights and interests from unauthorized administrative interference, but also more generally to ensure that public powers are exercised within their legal limits.

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[60] D.J. Mullan, "The Declaratory Judgment: Its Place as an Administrative Law Remedy in Nova Scotia" (1975), 2 Dalhousie L.J. 91 at 103. For an in-depth review of the role of the Attorney-General as representative of the public interest, *see* A.J. Roman, *supra* n. 47, Part V, esp. pp. 191-209.

The Australian Law Reform Commission's suggestion[61] that an "open door" approach to standing is most correct in principle, since it recognizes the interest of all citizens in the lawful performance of public duties, is not entirely unattractive when viewed with this guideline in mind. J.A. Smillie has made the following observation:

> Some commentators have argued for abolition of all locus standi requirements. They maintain that personal litigation costs and the risk of an order to pay the respondent's costs, together with the courts' existing 'avoidance' powers to strike out vexatious or hypothetical proceedings and deny relief in the exercise of their discretion, provide sufficient checks against officious meddlers. While the writer would preserve existing standing requirements for the private law and wider public law uses of the injunction and declaration, he sees *no real objection to complete abolition of all locus standi restrictions upon applications for review of exercises of governmental power by public officials* under [New Zealand's judicial review legislation].[62] [emphasis added]

5.68 Although the "open door" approach has some merit, it unduly accords recognition to the public interest in administrative legality to the exclusion of other interests which may militate against permitting a "stranger" to institute judicial review proceedings in the particular circumstances of the case. Accordingly, we have concluded that the outright abolition of all standing requirements would not be desirable.

5.69 We have given careful consideration to a wide array of options for reform respecting the law of standing in the context of judicial review.[63] We propose the adoption of a two-tiered formulation for standing, acknowledging the standing as of right for those actually affected or aggrieved by administrative action and, in addition, providing the court with the discretion to recognize the standing of an applicant where, in the court's view, it would be appropriate to allow the applicant to proceed on the basis of his interest as a member of the public.[64]

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[61] The Law Reform Commission (Australia), "Access to Courts - I - Standing: Public Interest Suits" (Working Paper No. 7, 1977) 71. In its final Report, the Australian Commission endorsed 'an open door with a pest screen', recommending that any person should have standing to commence public interest litigation unless it can be shown that, by doing so, the person is "merely meddling" (*supra* n. 47, at 140).

[62] *Supra* n. 35, at 160-161 [footnotes deleted].

5.70 The first arm of the test - "person affected" - would, in essence, represent a codification of the present trend in the common law in relation to standing to apply for the prerogative remedies. In the Commission's view, this affords an appropriate standard for standing as of right to seek all forms of relief in judicial review proceedings. Those whose personal interests are affected by administrative action clearly should have access to the courts where there arises a question as to the legality of such action.

5.71 Where the applicant in a case *is* a person affected, although not as directly affected as some other person, we are of the view that the applicant should nevertheless have the right to institute proceedings to protect his interest in the matter. The court may exercise its power to direct that the person primarily affected be served with notice of the proceedings and, if desired, added as a party to ensure that his interests are properly represented. The awarding of relief would, of course, remain in the court's discretion.

5.72 The second arm of the proposed standing provision - standing in the public interest - is framed within the court's discretion, and represents an extension of the principles developed recently in the context of standing to challenge the constitutionality of legislation.[64A] Such an approach recognizes the legitimacy of the public's interest in lawful administration, while permitting the court to weigh this public interest against possible countervailing interests. In determining whether to grant access, the court may consider, for example, whether the impugned decision or action raises serious issues of public concern; whether there exists a directly affected person who has chosen not to seek relief; whether the applicant is an appropriate individual or association to entrust with bringing the issue before the court for review; and whether other avenues of redress have been explored. We believe that this two-tiered approach to standing would best serve to recognize and protect both the private and public interests in administrative proceedings.

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[63] For an in-depth discussion of the options and considerations involved in reforming the rules of *locus standi*, *see* the background paper prepared for The Manitoba Law Reform Commission by J.J. Tokar, "Administrative Law: Locus Standi in Judicial Review Proceedings" (1984), 14 Man. L.J. 209. *See also* A.J. Roman, *supra* n. 47; The Law Reform Commission (Australia), *supra* n. 47; T.A. Cromwell, *Locus Standi: A Commentary on the Law of Standing in Canada* (1986), esp. Chapters 4 and 5.

[64] For three other versions of a two-tiered approach, *see* Barb, s. 6; LRCC, Recommendation 6.1; J.A. Smillie, *supra* n. 35, at 161.

5.73 We recommend:

RECOMMENDATION 9

That this standing provision consist of a two-tiered formulation, namely:

(a) standing as of right for those actually affected by the administrative action; and

(b) standing at the discretion of the Court where, in the Court's view, it would be appropriate to allow the applicant to proceed on the basis of his interest as a member of the public.

5.74 The Commission recognizes that there may be some circumstances in which it will be difficult to determine whether an applicant's interest is so remote as to fall outside the "person affected" category and into the "public interest" category. Most often, however, it will be clear which arm of the standing test is to be applied. We anticipate that, in the vast majority of

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[64A] Since the writing of this Report, the Supreme Court of Canada has handed down its decision in *The Minister of Finance of Canada* v. *Finlay*, December 18, 1986. The Court therein held that the discretionary approach to public interest standing developed in the context of challenges to the constitutionality of legislation should be extended to actions for declaratory or injunctive relief involving challenges to the legality of administrative action. Our proposal is in accord with this recent development in the common law.

cases, the applicant will be a party directly affected by the administrative decision; the sufficiency of the applicant's interest under the first arm of the test will be self-evident, and no contentious issue of standing will arise. In other cases - perhaps where the applicant is a group such as a civil liberties association - the applicant may not be able to demonstrate any personal effect whatsoever, and standing will clearly have to be determined on the basis of public interest under the second arm of the test.

D. THE GROUNDS OF REVIEW

5.75 The grounds of review establish the degree of control exercised by the judiciary over the activities of administrative bodies. Of central importance to our proposed statutory remedy, therefore, are the grounds upon which relief will be made available.

5.76 We have given consideration to the following interrelated issues:

1. Is reform of the common law grounds of review required, or should our proposed legislative scheme merely adopt the present grounds of review?
2. Is it desirable to codify the grounds upon which the new judicial review remedy will be available?
3. What relationship should there be between privative clauses, which purport to limit the scope of review in relation to the decisions of particular statutory authorities, and the availability of the grounds of review under the proposed Act?

1. Adequacy of the Common Law

5.77 The determination of the appropriate grounds of review raises a fundamental question as to the respective roles which should be played by the courts and the administrative agencies in the administrative process. Those who emphasize administrative expertise and efficiency will generally favour limited grounds of review; those who are suspect of administrative autonomy may call for the expansion of grounds to increase the degree of control exercised by the courts.

5.78 Are there any basic principles which should guide us in formulating the bases upon which judicial review may be sought? We begin with the premise that "findings of administrative agencies should normally be treated as conclusive where the matters to be decided lie within their particular expertise".[65] Judicial review, with its attendant delay and expense, is, generally speaking, functionally desirable only where the court is in a better position than the agency to make an authoritative decision respecting the matter in dispute. We must also be mindful of the fundamental constitutional tenet which holds that the exercise of public power is valid only when authorized by law. It is the function of the courts to protect citizens from the unauthorized or arbitrary exercise of public power, and to maintain the integrity of our legal system by upholding the rule of law. Bearing in mind these principles, are the common law grounds of review satisfactory?

5.79 The present grounds of review were outlined in Chapter 2 of this Report. Those which fall under the rubric of absence of authority appear to flow logically from the *ultra vires* doctrine, and provide a sound basis for judicial review. Where a challenge to an administrative decision rests on the alleged unconstitutionality of the agency's empowering statute, a superior court is unquestionably the appropriate body to adjudicate the matter. The same is true where the *Canadian Charter of Rights and Freedoms* is raised as a basis for review. As well, a tribunal of limited jurisdiction cannot conclusively determine the extent of its own authority; recourse to the courts for resolution of jurisdictional disputes must be available. Admittedly, the identification of jurisdictional matters sometimes involves difficult questions of statutory interpretation, and courts have on occasion appeared too willing to label as "jurisdictional" matters which were doubtfully so. We view these, however, as problems of application and not as deficiencies which call into question the legitimacy of the grounds *per se*. We trust that the Supreme Court of Canada's suggestion that courts show restraint in labelling matters as "jurisdictional"[66] will lead to a reasonable and discriminating application of the jurisdictional fact doctrine.

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[65] W.H. Angus, "The Individual and the Bureaucracy: Judicial Review - Do We Need It?" (1974), 20 McGill L.J. 177 at 191.

[66] *Canadian Union of Public Employees Local 963* v. *New Brunswick Liquor Corporation*, [1979] 2 S.C.R. 227 at 233.

5.80 Unlawfully declining to exercise authority (which is, in essence, the flipside of acting in the absence of lawful authority) similarly provides a sound basis for judicial review. Administrative authorities, entrusted by the Legislature with the performance of public duties, are properly subject to the court's control where they unlawfully refuse to perform their assigned functions.

5.81 The Commission is of the view that breach of the principles of natural justice/fairness and breach of statutory procedural provisions also constitute appropriate bases for judicial review. Courts have long served as guardians of procedural justice throughout our legal system and have developed considerable expertise in relation thereto. They also possess the necessary degree of objectivity to ensure that fairness is not unduly compromised in the interests of administrative expediency. This is not to suggest that courts should not defer to an agency's reasonable determinations respecting its own procedure, and we note with interest the Supreme Court of Canada's recent application of the "patently unreasonable" test to a procedural matter.[67]

5.82 Because the application and content of the common law procedural rules elude precise definition, they are perhaps open to criticism for lack of certainty and predictability. However, we are of the view that flexibility is a necessary attribute of the principles of fair procedure, given the wide variety of agencies and circumstances to which they must be applied. In Part I of our *Report on Administrative Law*,[68] we recommended that government agencies which make decisions directly affecting the rights or interests of individuals or groups have published rules of practice and procedure, and we provided several basic models for the development thereof on an agency-by-agency basis. The promulgation of such rules would have the desirable effect of adding a greater degree of certainty to the procedures which attend the administrative decision-making process. As well, future developments under the *Canadian Charter of Rights and Freedoms* will no doubt shape the procedures followed by some administrative agencies.

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[67] *Bibeault* v. *McCaffrey* (1984), 6 Admin. L.R. 239 (S.C.C.). In this case, however, the procedural rights in question were the subject of a specific statutory provision, and the tribunal was protected by a privative clause. It therefore cannot be asserted that, as a result of this decision, the "patently unreasonable" standard now applies in all cases where natural justice or procedural fairness is at issue. *See* the Annotation to *Bibeault* by D.J. Mullan in (1984), 6 Admin. L.R. 240.

[68] The Manitoba Law Reform Commission, *supra* n. 3.

5.83 We have also given consideration to the grounds relating to excess or abuse of authority, and have concluded that they should be retained as grounds for judicial review. The Commission acknowledges that decision-makers responsible for implementing governmental policy or administering regulatory schemes often require considerable latitude in exercising their discretionary powers, and that such flexibility is desirable in the administrative process. We also note that administrative agencies may possess a greater understanding of the objects and purposes of the legislative schemes under which they operate than will a generalist court. However, delegated discretionary power is never absolute or unfettered; it is always capable of being exceeded or abused. The impartial and independent review by our courts of the exercise of public power, therefore, provides a valuable and necessary safeguard within our legal system. On occasion, the courts may employ the notions of "irrelevant considerations" or "improper purposes" in a manner suspiciously reminiscent of an appeal on the merits. By and large, however,

> . . . courts . . . have shown commendable restraint in avoiding unwarranted intervention and have recognized a legislative intention that policy considerations should be left to the administrative agency. . . . So long as the courts continue to show restraint, judicial review of administrative discretion will not be subject to serious criticism.[69]

5.84 Fraud by a party should also continue as a basis for judicial review. In a different context Denning L.J. has said:

> No court in this land will allow a person to keep an advantage which he has obtained by fraud. No judgment of a court, no order of a Minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything. . . . [O]nce it is proved, it vitiates judgments, contracts and all transactions whatsoever . . . .[70]

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[69] W.H. Angus, *supra* n. 65, at 197-198.

[70] *Lazarus Estates Ltd.* v. *Beasley*, [1956] 1 Q.B. 702 at 712 (C.A.).

It would be an affront to our concept of justice to allow a party to enjoy the benefit of a decision in his favour which was procured by fraud and deception.

5.85 The question of whether the common law ground of 'no evidence' is satisfactory as a basis for review has given us some pause for thought. 'No evidence' has been the subject of statutory modification in several jurisdictions which have adopted judicial review legislation.[71] The *Federal Court Act*, for example, provides for review on the basis that the tribunal "based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it".[72] This statutory ground appears on its face to be broader than 'no evidence' at common law, potentially allowing the court to consider the sufficiency of the evidence and determine whether the tribunal's findings were reasonable in light of the evidence as a whole.[73] In this regard, it more closely resembles the 'substantial evidence' test employed in the United States. Thereunder, courts may examine the whole record, including any evidence which tends to detract from the probative value of the evidence upon which the agency's finding was based, to determine whether there was such relevant evidence as a reasonable mind might accept as adequate to support the agency's conclusion.[74]

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[71] Ont, s. 2(3); Can, s. 28(1)(c); Aust, s. 5(1)(h); Barb, s. 4(k).

[72] Can, s. 28(1)(c).

[73] For the view that Can, s. 28(1)(c) does expand the common law ground of 'no evidence', *see e.g.*, D.J. Mullan, "The Federal Court Act: A Misguided Attempt at Administrative Law Reform?" (1973), 23 U.T.L.J. 14 at 36; P.W. Hogg, "Judicial Review: How Much Do We Need?" (1974), 20 McGill L.J. 157 at 162; J.A. Kavanagh, *A Guide to Judicial Review* (2nd ed. 1984) 71.

However, despite the broad wording of s. 28(1)(c), the clause has generally been applied by the Federal Court in a manner which does not differ significantly from the common law 'no evidence' rule. *See e.g.*, *Re Commonwealth of Puerto Rico and Hernandez (No. 2)* (1973), 42 D.L.R. (3d) 541 (F.C.A.); *Mojica* v. *Minister of Manpower and Immigration*, [1977] 1 F.C. 458 (C.A.); *Sarco Canada Limited* v. *Anti-dumping Tribunal*, [1979] 1 F.C. 247 (C.A.).

[74] *Administrative Procedure Act*, U.S. Code, Title 5, s. 706(2)(E), empowering the court to set aside agency findings "unsupported by substantial evidence", as interpreted by the Supreme Court in *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474 (1951).

5.86 Is it advisable to modify the common law ground of 'no evidence' under our proposed judicial review legislation? We have concluded that this question should be answered in the negative. The 'no evidence' ground has been generally limited to situations where there is a complete lack of evidence of probative value on an essential point, although some cases have employed a somewhat more stringent standard of review. As well, it has recently been stated that a patently unreasonable finding of fact made by a tribunal in the course of exercising its authority constitutes a jurisdictional error.[75] We do not believe that a more searching standard of review is necessary or desirable. The tribunal before which the evidence is presented is in a better position to weigh and evaluate the evidence than is the reviewing court; as long as the tribunal proceeds on the basis of some evidence and exercises its fact-finding powers reasonably, the court need not interfere. Should the Legislature deem it advisable for a particular agency's findings of fact to be re-evaluated by a standard more exacting than that provided by the common law grounds, the proper course would be to provide expressly for an appeal from the agency's decisions.

5.87 In assessing the adequacy of the common law bases for review, it is the ground of error of law on the face of the record which the Commission has found the most troubling. Indeed, we see some merit in the suggestion that this anomalous ground of review should be abolished altogether. Its retention cannot be sustained by reference to the requirements of the *ultra vires* doctrine. Furthermore, in many cases, the tribunal may be in a better position to interpret the statutory provision in question in accordance with its legislative purpose than is the reviewing court.

5.88 In circumstances where the Legislature wishes the court to examine a tribunal's proceedings for intra-jurisdictional error of law, it would, in our view, be preferable for the Legislature to provide for an appeal. In the absence of an appeal provision, it would be assumed that the tribunal was entrusted with the 'final' determination of all matters of fact, policy and law which fell within the scope of its authority and area of expertise.

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[75] *Blanchard* v. *Control Data Canada Limited*, [1984] 2 S.C.R. 476. Whether this ground is best viewed as constituting an abuse of authority, an unreasonable error of law or an expanded version of the 'no evidence' rule is not entirely clear.

Judicial review would be available only where the tribunal acted *ultra vires* or where it so unreasonably interpreted the law or facts in the course of exercising its authority that it, in effect, stepped outside the limits of its authority.

5.89 However, this non-interventionist approach to a large degree presupposes the existence of an appeal structure whereby recourse by way of appeal is granted in all circumstances where the Legislature does *not* wish the tribunal itself to be the 'final arbiter' of questions of law. In Part I of our ***Report on Administrative Law***, we recommended that the rights of appeal from decisions of provincial government agencies be reviewed and reformed where necessary. We also provided guidelines for determining the circumstances in which the provision of an avenue of appeal might be appropriate. However, until such time as a fully-integrated system of statutory appeals is devised, the outright abolition of the ground of intra-jurisdictional error of law would appear premature.

5.90 It must be acknowledged that a limited role for judicial review, similar in effect to that envisaged above by the Commission, can be realized at present through the use of privative clauses. The starting premise is that intra-jurisdictional error of law *is* an appropriate ground of review. Where interference by the reviewing court on intra-jurisdictional questions of law is deemed undesirable, such review can be prohibited by a properly-framed privative clause, rendering only patently unreasonable interpretations reviewable. Although we view this as conceptually less attractive than the previously-discussed approach, it nevertheless does permit the Legislature to tailor the degree of judicial control on an agency-by-agency basis.

5.91 As we discussed briefly in Chapter 2 of this Report, several cases have suggested that, even in the absence of a privative clause, the courts may choose not to intervene in judicial review proceedings for intra-jurisdictional error of law. Whether these developments will result ultimately in the demise of error of law on the face of the record as a ground of judicial review remains to be seen. Such a result, if coupled with the development of a carefully devised system of appeals, would in our view not be undesirable. However, at present we are content to adopt the common law position respecting intra-jurisdictional error of law. We are firmly of the view, however, that review for intra-jurisdictional error of law under our proposed legislative scheme should remain subject to any limitations imposed by privative clauses or by the principle of "curial deference" at common law.

5.92 Having concluded that review for intra-jurisdictional error of law should for the time being remain available, two questions remain. Should the common law definition of "record" be maintained? Should review for intra-jurisdictional error of law be restricted to the "record", however defined?

5.93 In British Columbia, for example, "record" is defined to include not only initiating documents and the tribunal's decision, but also the transcript (if any) of oral evidence, documentary evidence and any reasons given by the tribunal for its decision.[76] Ontario's *Statutory Powers Procedure Act*[77] requires that certain tribunals compile a record including similar materials. Expanding the content of the record indirectly broadens the scope of review for error of law on the face of the record; the more extensive the materials which may be examined for error, the greater the likelihood that an error of law will be discovered.

5.94 Rule 1402 of the Federal Court Rules similarly provides for a wide array of materials to be examined on a section 28 application for review. However, in addition, the grounds of review include "erred in law in making its decision or order, *whether or not the error appears on the face of the record*".[78] [emphasis added] A similar ground of review is adopted in the judicial review legislation of Australia and Barbados.[79] It has been suggested that the purpose of dispensing with the requirement that an error be apparent on the record (even if broadly defined) was to prevent a tribunal from circumventing review for error of law by giving no reasons for its decision.[80] The court would be free to examine the evidence and determine that the decision was insupportable in law even though, for lack of reasons, the error was not patent on the record. As well, where reasons were given orally, affidavit evidence respecting the oral reasons could be introduced and examined for error of law.

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[76] BC, s. 1.

[77] *Statutory Powers Procedure Act*, R.S.O. 1980, c. 484, s. 20.

[78] Can, s. 28(1)(b).

[79] Aust, s. 5(1)(f); Barb, s. 4(j).

5.95 To introduce a comprehensive definition of "record" might be viewed as improving the law by making it more certain. At present, the contents of the record appear rather fortuitous. Why should the evidence and reasons for decision form part of the record if incorporated in the tribunal's order but not otherwise? Furthermore, it may be argued that to restrict review for error of law to the record, however widely defined, is to maintain a "needless and unjustifiable technicality"[81] in the law. Why should the reviewability of an error of law depend upon its appearance on the face of the record?

5.96 In light of our general misgivings about this ground of review, we are not in favour of extending review to "error of law, *whether or not the error appears on the face of the record*"; review for intra-jurisdictional error of law should be kept to a minimum. Furthermore, we do not view the restriction regarding appearance on the face of the record as a mere anachronistic technicality. Rather, this proviso limits judicial intervention to those cases where an incorrect legal proposition or ruling is actually apparent in the tribunal's record of proceedings. It prevents the court from examining the tribunal's materials and concluding *by inference* that the tribunal must have erred in law in reaching its decision. We would not view such a conjectural process, however judiciously exercised, as desirable.

5.97 Having concluded that review for intra-jurisdictional error of law should remain limited to those errors patent on the record, it remains to determine the appropriate content of the record.

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[80] J.A. Kavanagh, *supra* n. 73, at 67.

[81] D.J. Mullan, *The Federal Court Act*, Law Reform Commission of Canada (1977) 55.

5.98 The Commission would not favour a general expansion of the record to include a transcript of the oral evidence and any documentary evidence introduced at the hearing before the tribunal.[82] To do so might blur the distinction between judicial review and an appeal. Unless the tribunal's conduct, statements or rulings in the course of its proceedings constitute a breach of the rules of natural justice or other form of jurisdictional error, the transcript should not be probed for irregularities. In Part I of our *Report on Administrative Law*, we recommended that certain agencies be required to record their proceedings to allow for the preparation of a transcript of the oral evidence presented. Where desired, the legislation could also provide that the transcript forms part of the tribunal's record. Any such determination, however, should be made on an 'agency-specific' basis, rather than in general judicial review legislation.

5.99 However, we do propose that any statement of reasons given by the tribunal for its decision, whether provided voluntarily, pursuant to statutory mandate or pursuant to the requirements of the *Canadian Charter of Rights and Freedoms*, should form part of the record of proceedings.[83] We view such reasons as constituting an integral part of the tribunal's decision or order. Their inclusion in the record should not depend upon the arbitrary test of whether they were "incorporated by reference" in the tribunal's actual decision.[84]

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[82] It should be noted that this would not preclude the court from examining the evidence where the ground of 'no evidence' was raised. As indicated in Chapter 2 of this Report, it is generally accepted that 'no evidence' constitutes a species of jurisdictional error. In such a case, review is not limited to the record.

[83] In Part I of our *Report on Administrative Law*, *supra* n. 3, we recommended that certain agencies be required by legislation to furnish a party with a written statement setting out the findings of fact upon which its decision was based and the reasons for its decision, where requested to do so by the party. As to the importance and desirability of written reasons, *see* the comments in *Re Glendenning Motorways, Inc. and Royal Transportation Ltd.* (1975), 59 D.L.R. (3d) 89 (Man. C.A.); *Quest Real Estate Ltd.* v. *Armstrong*, [1986] 1 W.W.R. 662 (Man. C.A.).

For the suggestion that the principles of fundamental justice under s. 7 of the *Canadian Charter of Rights and Freedoms* may impose a requirement to give reasons, *see Re D & H Holdings Ltd. and City of Vancouver* (1985), 21 D.L.R. (4th) 230 (B.C.S.C.); H.L. Kushner, "The Right to Reasons in Administrative Law" (1986), 24 Alta. L. Rev. 305.

5.100 We recommend:

RECOMMENDATION 10

That the common law grounds of judicial review provide the basis upon which relief is available under the proposed Act.

2. Codification of the Grounds of Review

5.101 Having determined that the common law grounds of review would provide a satisfactory basis for review under our proposed statutory remedy, it remains to decide how best to incorporate such grounds into the new legislation. This raises an issue as to the desirability of codifying the grounds upon which judicial review will be available.[85]

5.102 There are several arguments which are traditionally advanced in favour of codification:

(a) It provides an opportunity for changing the law, either to expand or decrease the degree of judicial control exercised over administrative authorities.

As it is the Commission's desire to maintain the present common law grounds, this primary factor in favour of codification is not of relevance.

(b) Codification renders the law more certain and predictable.

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[84] Indeed, there is some suggestion that the common law itself may be on the verge of laying to rest this formalistic test, and that reasons, whenever given, will be held to form part of the record. *See R.* v. *Knightsbridge Crown Court*, [1981] 3 W.L.R. 640.

[85] This issue was explored in some detail in a background paper prepared for The Manitoba Law Reform Commission by J.J. Tokar, "Administrative Law: Codification of the Grounds of Judicial Review" (1984), 14 Man. L.J. 171. References to other law reform agencies and authors who have considered this issue are provided therein.

However, it appears to the Commission that the grounds upon which review is available at present are readily apparent. The difficulty lies in defining the scope of the grounds, and their application, in the particular circumstances of the case. Codification would merely state the obvious (the grounds) without addressing the difficult (their scope and application in the particular case).

(c) Codification has presentational and educational advantages, for both laymen and administrators.

While this point may be of some merit, its significance should not be exaggerated; few will be enlightened by codified grounds which refer to such complex and flexible concepts as "jurisdiction" or "natural justice".

5.103 Arguments presented against codification include the following:

(a) Codification introduces rigidity into the law and stifles judicial development.

However, we believe that codification need not operate as a constraint upon the courts. The grounds could be framed in general terms, leaving the courts sufficient room to manoeuver and adapt the law to new circumstances.[86]

(b) A code leads to interpretational difficulties: it will fail to capture the subtleties which attend the common law; courts may ascribe narrow linguistic interpretations to the statutory terms; certain common law grounds may be inadvertently omitted or inadequately expressed.

As a matter of experience, codification of grounds has not spawned inordinate interpretational difficulty under the *Federal Court Act* or under Australia's judicial review legislation. Furthermore, we trust that these concerns could be met by drafting the grounds in comprehensive yet general terms. The refinements and subtleties of the common law would be embellished thereon as a matter of judicial interpretation and application.

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[86] Codification of the grounds for evocation (a merger of certiorari and prohibition), PQ, art. 846, has not stifled the evolution and judicial development of the law.

5.104 Having surveyed the merits of codification, we are inclined neither to extol nor condemn. We have concluded that codifying the grounds of review, in itself, would likely be somewhat neutral in its effect - not particularly dangerous, but not particularly beneficial.

5.105 We return to the question of how to incorporate the common law grounds into our proposed legislative scheme. We have given consideration to several options:

(a) Being silent as to the grounds upon which review would be available.

Presumably, the court would fill in this gap by employing the common law grounds of review. We have dismissed this option, however, as being somewhat precarious.

(b) Incorporating the common law grounds by reference, without actually specifying the grounds.[87] For example, it could simply be stated that relief would be available whenever a decision was "contrary to law".

We were initially most attracted to this second option, as providing a means to incorporate the common law grounds without any attendant danger of distorting the grounds or restricting their future development. We have experienced, however, two concerns. First, we believe there may arise some uncertainty as to whether "contrary to law" includes errors of procedure. Secondly, the possibility exists that the phrase may be interpreted as rendering *all* questions of law reviewable. We have therefore, somewhat reluctantly, rejected this second option as well.

(c) Codifying the grounds of review, either in very general terms or by providing a detailed list of all the specific grounds.[88]

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[87] Such an option was elsewhere briefly considered and rejected: *Prerogative Writ Procedures - Report of Committee of Review* (Australia), Parliamentary Paper No. 56 (1973) ("Ellicott Committee Report"), at 9.

[88] *Compare* Can, s. 28(1) *with* Aust, s. 5, s. 6, s. 7 and Barb, s. 4.

As stated earlier, we do not view codification as being riddled with danger. However, we do believe that the risk of interpretational difficulty (such as it is) does increase where the grounds of review are drafted in minute detail. Greater chance exists of a ground being misstated, or of the *expressio unius est exclusio alterius* principle of interpretation rendering the law too narrow.[89]

5.106 We have concluded that the common law grounds of review should be codified in general, comprehensive terms. We are aware that codification is not a panacea; it will not provide answers to such intractable questions as "What constitutes procedural fairness in this particular case?" or "What considerations are relevant or irrelevant in relation to this particular administrative decision?" We do believe, however, that the statement of grounds will serve as an integral part of a scheme of judicial review under which the merits of a case can be considered without reference to a categorization of functions or technical remedial distinctions. That is, the grounds of review will have been divorced from the intricate network of the common law forms of relief. Accordingly, it is our recommendation:

RECOMMENDATION 11

That the common law grounds of review under the Act be codified in general, comprehensive terms, such that the Court is empowered to intervene where the tribunal

(a) failed to comply with a principle of natural justice or procedural fairness or a prescribed matter of procedure, where such compliance was required;

(b) otherwise acted or proposed to act without or in excess of or in abuse of its authority, or unlawfully refused to exercise its authority;

(c) committed an error of law in the course of exercising its authority, which is apparent on the face of the record, unless review on this basis is precluded by statute [see Recommendation 13] *or otherwise by law;*

(d) made a decision induced or affected by fraud.

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[89] *See e.g.*, the concerns expressed by J. Griffiths, "Legislative Reform of Judicial Review of Commonwealth Administrative Action" (1978), 9 Fed. L. Rev. 42.

5.107 In keeping with our earlier comments respecting error of law on the face of the record (§5.99), we further recommend:

RECOMMENDATION 12

That the Act expressly define "record" to include any reasons given by the tribunal for its decision.

3. Privative Clauses

5.108 A privative clause is a statutory provision which purports to oust the jurisdiction of the superior court to review the legality of an administrative decision. Such clauses vary in their wording; they may provide that the tribunal's decisions are "final and conclusive", or that the tribunal has "exclusive jurisdiction" to determine matters raised before it, or that the tribunal's proceedings and decisions are not subject to review by certiorari, prohibition, mandamus, injunction or other proceeding ("no-certiorari clause").[90] It is well established that privative clauses are ineffective to shield a tribunal from review with respect to jurisdictional errors, including breach of the rules of natural justice. However, the use of a privative clause provides a signal to the reviewing court that decisions of the tribunal in relation to intra-jurisdictional questions of law are not to be disturbed unless patently unreasonable.

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[90] *See e.g., The Rivers and Streams Act*, C.C.S.M. c. R160, s. 26(1) ("final and conclusive"); *The Human Rights Act*, C.C.S.M. c. H175, s. 25(6) ("exclusive jurisdiction"); *The Criminal Injuries Compensation Act*, C.C.S.M. c. C305, s. 21(2) ("no-certiorari"); *The Workers Compensation Act*, C.C.S.M. c. W200, s. 51(1) (employing a triple-whammy combination of "final and conclusive", "exclusive jurisdiction" and "no-certiorari"). The traditional view is that "final and conclusive" provisions are not true privative clauses. However, *The Alberta Union of Provincial Employees* v. *The Board of Governors of Olds College*, [1982] 1 S.C.R. 923, has been interpreted as recognizing that such clauses may have a "privative effect": *Ontario Public Service Employees Union* v. *Forer* (1985), 15 Admin. L.R. 145 (Ont. C.A.). With respect to "exclusive jurisdiction" clauses, note that they may also serve the function of distinguishing intra-jurisdictional matters from preliminary or collateral matters; *see e.g., The Workers Compensation Act*, s. 51(2).

5.109 The relationship between privative clauses and the scope of review under judicial review legislation in other jurisdictions varies. Subsection 28(1) of the *Federal Court Act*, for example, provides for review "[n]otwithstanding . . . the provisions of any other Act", thereby nullifying the effect of privative clauses in those statutes enacted prior to the Act or in subsequent re-enactments which do not constitute "new law".[91] In contrast, proceedings under the judicial review legislation in Ontario and British Columbia remain subject to any limitations imposed by privative clauses.[92]

5.110 Earlier in our discussion of the grounds of review, we envisioned a scheme of judicial review based exclusively on the *ultra vires* doctrine, under which the ground of intra-jurisdictional error of law would be abolished. In cases where it was deemed desirable for a tribunal's findings of law to be reviewed by a standard more exacting than "patent unreasonableness", provision could be made for an appeal. Under such a scheme, privative clauses would serve little or no function. However, we refrained from proposing the adoption of this model of judicial review at the present time, believing it could be developed only in conjunction with a thorough examination of appeal provisions from the decisions of administrative authorities, made with this new model of judicial review in mind. Such a task is beyond the scope of this Report.

5.111 Accordingly, we recommended that error of law on the face of the record be retained as a ground of review under our proposed Act. Because we view privative clauses as one means by which the Legislature can indicate its intention that "curial deference" be given to a particular decision-maker's expertise, we propose that review for error of law under our Act remain subject to any limitations imposed by privative clauses. We wish to add that we do not see this as precluding a reviewing court from deferring to an agency's reasonable findings even in the absence of a privative clause.

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[91] *Attorney General of Canada* v. *Public Service Staff Relations Board*, [1977] 2 F.C. 663 (C.A.). *See also* Aust, s. 4; LRCC, Recommendation 5.4. *Cf.* Law Reform Commission of Canada, *Independent Administrative Agencies* (Report No. 26, 1985), Recommendation 16.

[92] Ont, s. 12(1); BC, s. 21, s. 4. *See also* Ont, s. 2(2); BC, s. 3.

5.112 At minimum, existing privative clauses should be examined to ensure that they extend to review under our proposed Act. It appears to us, upon cursory examination, that most existing clauses would apply to our Act without amendment. The effect of "final and conclusive" clauses or "exclusive jurisdiction" clauses should be the same whether review is sought at common law or under the Act. As well, most "no-certiorari" clauses prohibit review by way of the prerogative orders "or other proceeding". As a matter of statutory interpretation, the reference to "other proceeding" would likely be read to embrace proceedings under the proposed legislation. Nevertheless, a comprehensive review of privative clauses is required.

5.113 We are not content merely to propose that existing clauses be reviewed, and redrafted if necessary, to ensure compatibility with the Act; a more functional and substantive review is in order. We earlier expressed the view that privative clauses should be designed on an agency-by-agency basis. In order for such custom-tailoring to be meaningful, privative clauses must not be inserted into legislation in an arbitrary or haphazard manner. In each case, the relative expertise of the tribunal and the court must be weighed to determine which body is best qualified to perform the task of statutory interpretation. Not all public authorities bring special knowledge of their legislation's history, context and purpose to bear in the exercise of their decision-making functions. Where the tribunal members possess or display no particular sensitivity or expertise, according "curial deference" to their findings may be inappropriate; full review for error of law may be warranted and no privative clause is in order. As well, where several different decision-makers must interpret the same statutory provision or contractual term, the need for one definitive interpretation by the court, in the interests of uniformity and certainty, might call for review by a standard more exacting than patent unreasonableness.[93]

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[93] *See* the concerns expressed by Moir J.A. in *United Nurses of Alberta, Local 11* v. *Misericordia Hospital*, [1983] 6 W.W.R. 1 (Alta C.A.).

5.114 Privative clauses should be employed only where it is desired to limit the court's intervention on intra-jurisdictional questions of law to situations where the tribunal gave a patently unreasonable interpretation to a statutory term or contractual term in the course of exercising its authority. It may be that an examination of existing clauses will reveal that they meet this criterion, but such a result cannot simply be presumed.

5.115 We also propose that privative clauses, where retained, be rephrased to more clearly reveal their purpose and scope. The sometimes sweeping, sometimes obscure, wording of many existing privative clauses is misleading as to the actual effect of such clauses. It would be preferable if the legislation empowering the agency expressly provided that, in judicial review proceedings, the court ought not to intervene on the basis of error of law in relation to matters within the area of the agency's expertise (or with respect to certain specified issues) unless the agency's findings, interpretations or rulings were patently unreasonable.

5.116 We therefore recommend:

RECOMMENDATION 13

That the availability of review for error of law on the face of the record under the proposed Act be made subject to any restrictions imposed by privative clauses.

RECOMMENDATION 14

That privative clauses be utilized only where the Legislature deems it appropriate that the Court's power to review questions of law arising within the tribunal's area of authority and expertise be limited to situations where the tribunal's findings, interpretations or rulings were patently unreasonable.

RECOMMENDATION 15

That privative clauses in legislation be phrased to reflect their purpose and scope as outlined in Recommendation 14.

E. RELIEF AVAILABLE ON AN APPLICATION FOR REVIEW

1. General

5.117 All forms of relief now obtainable by way of certiorari, prohibition, mandamus, declaration and injunction should be made available on an application for an "order upon review" under the proposed Act. Our recommendation on the available forms of relief is as follows:

RECOMMENDATION 16

That the Court be empowered under the Act to make one or more of the following orders where grounds for review have been established in relation to a reviewable decision:

(a) an order quashing or setting aside the decision or part of the decision (relief formerly available by certiorari);

(b) an order declaring the rights of the parties, the validity of the decision or other matters to which the decision relates (relief formerly available by declaration);

(c) an order compelling the doing of any act or the making of the decision according to law (relief formerly available by mandamus); or

(d) an order prohibiting the making of the decision, or prohibiting any act in preparation for, in furtherance of, or pursuant to the making of the decision (relief formerly available by prohibition or injunction).

5.118 In addition, we are of the view that the Court should be empowered to make an order referring the matter or part of the matter to which the application relates back to the tribunal for further consideration, subject to such directions as the Court considers proper. This would permit the original decision-maker to reconsider the matter in light of the guidance provided by the Court without the necessity for a complete rehearing of the matter at issue. Such a power might prove especially useful, for example, where the original decision was tainted by irrelevant considerations or based upon an erroneous interpretation of the law. A similar power to remit has been included in judicial review legislation in several other jurisdictions.[94] We recommend:

RECOMMENDATION 17

That the Court be empowered under the Act to make an order referring the matter (or part of the matter) to which the application relates back to the tribunal for reconsideration and determination, subject to such directions as the Court considers proper.

5.119 As well, we believe it would be prudent to provide expressly that, where any matter is referred back to the tribunal by the Court, the tribunal has the authority to reconsider and determine the matter in accordance with the Court's directions.[95] We recommend:

RECOMMENDATION 18

That the Act expressly provide that, where any matter is referred back to the tribunal by the Court, the tribunal has the authority to reconsider and determine the matter in accordance with the Court's directions.

2. Discretion to Refuse Relief

5.120 We have noted in our summary of the existing law that the granting or withholding of the traditional forms of relief lies within the discretion of the court. Factors which may influence the court to exercise its discretion to refuse relief include the following:

i) undue delay by the applicant, particularly if the delay is prejudicial to other parties or would cause substantial inconvenience;

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[94] BC, s. 5; NZ, s. 4(5); Aust, s. 16(1)(b); Barb, s. 9; Eng Rules, r. 9(4); NB, r. 69.13(7); Sask, r. 674.

[95] *See* NZ, s. 4(5B).

ii) unmeritorious conduct by the applicant or improper motives;

iii) acquiescence or waiver by the applicant in the impugned proceedings;

iv) existence of a technical defect rather than one that is fundamental in nature;

v) availability of another equally effective and convenient remedy;

vi) granting of relief being contrary to the public interest or resulting in serious public inconvenience;

vii) failure to demonstrate that a useful purpose would be served by the granting of the remedy.

5.121 Several of these factors will be individually examined later in this Report. In general, however, the Commission is of the view that the Court's discretion to refuse relief should be preserved under the new Act. It is noted that such discretion has been incorporated into the judicial review legislation in several other jurisdictions.[96]

5.122 We appreciate that the alternative approach, whereby relief would lie as of right upon the establishment of the illegality of an administrative act, has some attraction. It may impose a greater degree of certainty in this area. As well, it may be considered that, because judicial review is concerned with ensuring lawful administration, a remedy should necessarily be granted once sufficient cause is shown.

5.123 However, it must be remembered that discretion to refuse relief is not exercised in an arbitrary or capricious manner; the principles upon which relief may be denied have been well-developed in the case law and have attracted little criticism. As well, we are of the view that the existence of discretion furnishes a desirable element of flexibility in review proceedings, and that "the rigorous application of the rule of law by means of judicial review without regard to factors such as the worthiness of the applicant or his case and administrative efficiency could lead to unfortunate results in particular cases."[97]

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[96] BC, s. 8; Ont, s. 2(5); NZ, s. 4(3). *cf*. Aust, s. 16.

5.124 The Commission proposes that such discretion should be framed in general terms. It appears to us that the factors upon which the Court exercises its discretion, inherently of a flexible nature, are not appropriately the subject of codification. Not only would it be difficult to devise an exhaustive list of discretionary grounds for refusal, but we do not see any substantial benefit arising out of such an attempt to codify.

5.125 One discretionary element which would not survive under the new judicial review scheme is the discretion to refuse an application for declaratory or injunctive relief on the ground that an application for prerogative relief would be more appropriate. Because all forms of relief are available in one proceeding without reference to the traditional remedies, such a ground would be of no relevance in the new proceeding.[98]

5.126 We recommend:

RECOMMENDATION 19

That the Court's discretion to refuse relief be preserved under the Act.

3. Interim Relief

5.127 The primary purpose of interim relief in judicial review proceedings is to preserve the status quo - to prevent irreparable damage or detrimental change of circumstance - pending final determination of the application. As noted in our review of the existing law, to this end an interim injunction may be granted in actions. As well, in proceedings for a prerogative remedy, the court may have the power to order a stay of proceedings before the respondent tribunal.

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[97] The Law Reform Commission of Western Australia, *supra* n. 47, at 109.

[98] *See also* our discussion later in this Report respecting the proposed power of the Court to grant relief in addition to or in substitution for the relief sought by the applicant (§5.214).

5.128 As will be discussed later in this Report (§5.156 ff.), we propose that judicial review under the new legislative scheme be sought in summary proceedings. Accordingly, we hope that the resolution of an application will generally be sufficiently expeditious so that interim relief is not frequently required. As well, it would appear that it is the practice of many tribunals in Manitoba to suspend their proceedings voluntarily once an application for review has been commenced.

5.129 Situations might, however, arise where interim relief would be appropriate, and we are of the view that the Court should be empowered to grant relief on an interim basis. Both Ontario and British Columbia provide in their judicial review legislation for the granting of such interim order as the court considers proper pending the final determination of the application.[99] This type of general provision has been interpreted as empowering the court to issue an interim injunction or to order a stay of proceedings.[100] In contrast, the judicial review legislation in New Zealand specifies in some detail the various forms of interim relief which may be granted by the court for the purpose of preserving the position of the applicant.[101]

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[99] Ont, s. 4; BC, s. 10. *See also* NZ, s. 8, prior to the 1977 amendments. Such a provision was also advocated in England by The Law Commission, *Report on Remedies in Administrative Law* (Law Com. No. 73, Cmnd. 6407, 1976) and in Alberta by the Institute of Law Research and Reform (Alta, r. 753.15). *cf.* NB, r. 69.06(1); Barb, s. 7; Sask, r. 668.

[100] *Laytons Wines Ltd.* v. *Wellington South Licensing Trust*, [1976] 2 N.Z.L.R. 760 (S.C.); *Re Hayles and Sproule* (1980), 29 O.R. 500 (Div. Ct.); *Hamilton & Spill Manufacturing (1974) Ltd.* v. *Attorney General of British Columbia* (1983), 4 Admin. L.R. 81 (B.C.S.C.); *Consolidated-Bathurst Packaging Ltd.* v. *International Woodworkers of America, Local 2-69* (1984), 2 O.A.C. 227 (Div. Ct.); *Nel-Gor Castle Rest Home* v. *London and District Service Workers' Union, Local 220* (1985), 9 Admin. L.R. 317 (Ont. Div. Ct.).

5.130 Although we believe that a general provision empowering the Court to grant relief on an interim basis would suffice, we see some benefit in specifying the forms which such interim relief might take: an order in the nature of an interim injunction, a stay of proceedings, or a stay of the administrative decision. We recommend:

RECOMMENDATION 20

That the Court be empowered under the Act to grant such interim order as the Court considers proper, including

(a) an order prohibiting or compelling the doing of any act in connection with a matter to which the application relates;

(b) an order staying any proceedings before the tribunal; or

(c) an order suspending the operation or effect of the tribunal's decision or of any act or order in furtherance of, or pursuant to, the tribunal's decision.

4. Relief Against the Crown

5.131 In our discussion of the existing remedies, we noted that prerogative relief is generally regarded as being unavailable against the Crown. This restriction appears to have given rise to little difficulty with respect to certiorari and prohibition, as circumstances are rare where these remedies would be appropriate in relation to the activities of the Crown *per se*. With respect to mandamus, however, the rules of Crown immunity have been the subject of some criticism. Where a peremptory duty has been imposed upon the Crown which would normally be enforceable by mandamus, there appears to us at this time to be no convincing justification for precluding relief.[102] As well, the immunity of the Crown from mandamus has led to the troublesome and artificial distinction between a Crown servant performing a duty owed by the Crown (in relation to which mandamus would not lie) and performing a duty imposed upon the servant himself (in relation to which mandamus would lie). As noted by the English Law Commission, "[i]t is difficult to see why the law should draw this distinction; it seems unreasonable that the availability of a remedy should depend on whether the duty is imposed upon the Crown or a named Minister or other Crown servant."[103]

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[101] NZ, s. 8(1). Note the extended power of the court under NZ, s. 8(1)(c) to declare in force a licence which has expired, or which will expire, prior to the final determination of the application for review; *see Nair* v. *Minister of Immigration*, [1982] 2 N.Z.L.R. 571 (H.C.).

5.132 We have also discussed previously in this Report the extent of the immunity of the Crown and its servants from injunctive relief. As with mandamus, we are not convinced at this time of the cogency of the reasons advanced for the Crown's immunity from this remedy.[104]

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[102] *See* P.W. Hogg, *Liability of the Crown* (1971) who refers to the immunity of the Crown from mandamus as "a grave defect in the remedial law" (at p. 13).

Note, however, the suggestion that where breach of the *Canadian Charter of Rights and Freedoms* is established, mandamus may issue against the Crown and its representatives: *Levesque* v. *Attorney-General of Canada* (1985), 25 D.L.R. (4th) 184 (F.C., T.D.).

[103] The Law Commission (England), *supra* n. 43, at 27. *See also* Law Reform Commission of British Columbia, *Report on Civil Rights, Part I - Legal Position of the Crown* (Report No. 9, 1972) 34.

[104] It has been suggested by some that injunctive relief should be made available against the Crown and its servants. *See e.g.*, H. Street, *Governmental Liability* (1953) 142 with respect to Crown servants; *de Smith, supra* n. 7, at 448, with the qualification that disobedience should not constitute contempt; The Law Commission (England), *supra* n. 43, at 70-71.

Quaere if Crown immunity from injunctive relief offends section 15 of the *Canadian Charter of Rights and Freedoms*. With respect to the application of section 15 to the Crown in a different context, *compare Kurolak* v. *Minister of Highways & Transportation* (1986), 28 D.L.R. (4th) 273 (Sask. Q.B.), holding that the Crown is not an individual contemplated by section 15 *with Re Wright and Attorney-General of Canada* (1986), 56 O..R. (2d) 636 (Dist. Ct.), holding that section 15 does apply to the Crown. *See also Lennox Industries (Canada) Ltd.* v. *Her Majesty the Queen*, F.C. T.D., January 5, 1987, Reed, J.

5.133 It is probable that, absent the introduction of a specific provision making all forms of relief under our proposed Act applicable to the Crown, these immunities would survive and extend to orders upon review made under the new Act which are similar in nature to the prerogative and injunctive remedies. We note, however, that declaratory relief, which is available against the Crown, would in most cases provide a satisfactory alternative to injunctive and mandatory orders. While not coercive in their effect, declaratory orders would doubtless be complied with by the Crown. In practical terms, therefore, the retention at this time of Crown immunity from some forms of relief should lead to little, if any, hardship or injustice.

5.134 While we believe that the Crown's immunity from prerogative and injunctive relief requires further study and, possibly, reform, we are of the view that such an examination generally falls beyond the scope of this Report. Such matters would best be considered as part of a comprehensive study of the privileges, immunities and special legal position of the Crown.

5.135 There is one matter related to Crown immunity, however, which we believe does require immediate attention. As noted earlier in our Report, the unavailability of the injunction against the Crown precludes the awarding of an interim injunction against those falling within the scope of the Crown's immunity. The availability of a declaratory order in lieu of an injunction is in this regard of no benefit, as the courts generally have held that no such remedy as an interim declaration exists.[105] The result is that interim relief cannot be obtained against the Crown or against those Crown officers who are protected from injunctive relief to prevent irreparable unlawful interference with rights pending the final hearing of an application for review. The need to have available interim relief against the Crown and its servants is widely acknowledged.[106]

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[105] *International General Electric Company of New York Ltd.* v. *Commissioners of Customs and Excise*, [1962] Ch. 784 at 790 (C.A.); *Underhill* v. *Ministry of Food*, [1950] 1 All E.R. 591 (Ch. D.); *MacLean* v. *Liquor Licence Board of Ontario* (1975), 61 D.L.R. (3d) 237 (Ont. Div. Ct.); *Shaw* v. *R. in Right of British Columbia*, [1982] 6 W.W.R. 718 (B.C.S.C.). *But see Gloucester Properties Ltd.* v. *R. in Right of British Columbia*, [1980] 6 W.W.R. 30 (B.C.S.C.); *Peralta* v. *Minister of Natural Resources of Ontario* (1984), 46 C.P.C. 218 (Ont. H.C.), where, contrary to the weight of authority, an interim declaratory order was made.

5.136 It may be that a full review of the immunities of the Crown would lead to a determination that interim injunctions should be made available against the Crown.[107] At present, however, the Commission proposes that relief in the nature of an interim declaration be made available in judicial review proceedings against the Crown and those Crown officers immune from injunctive relief. Such relief should prove adequate in preserving the status quo pending a final hearing, as it is expected that the Crown would respect the terms of an interim declaration. As well, such a non-coercive remedy avoids the problems associated with enforcing an injunctive order against the Crown in the unlikely event of non-compliance.

5.137 The Law Commission in England recommended an amendment to the *Crown Proceedings Act 1947* empowering the court to declare the terms of an interim injunction against the Crown.[108] Although many of the recommendations contained in The Law Commission's report were subsequently implemented, the suggested amendment to the *Crown Proceedings Act 1947* was not made.

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[106] *de Smith*, *supra* n. 7; H. Street, *supra* n. 104; R.J. Sharpe, *Injunctions and Specific Performance* (1983) 173; B.V. Harris, "Interim Relief Against the Crown" (1981), 5 Otago L. Rev. 92; Law Reform Commission of British Columbia, *supra* n. 103, at 31; The Law Commission (England), *supra* n. 99, at 23; Lord Diplock in *Inland Revenue Commissioners* v. *Rossminster Ltd.*, [1980] A.C. 952 at 1014 (H.L.); *but cf.* Lord Wilberforce (p. 1001), Viscount Dilhorne (p. 1007) and Lord Scarman (p. 1027) in *Rossminster*, *above*; Sir Thomas Barnes, "The Crown Proceedings Act, 1947" (1948), 26 Can. Bar Rev. 387 at 395. *See also* the background memorandum prepared for The Manitoba Law Reform Commission by J.J. Tokar, "Administrative Law: Injunctive Relief Against the Crown" (1985), 15 Man. L.J. 97.

[107] This conclusion in relation to judicial review proceedings has been reached by the Law Reform Commission of Canada, LRCC, Recommendation 6.5. *See also* The Law Commission (England), *supra* n. 43, at 70; Public and Administrative Law Reform Committee (New Zealand), *Administrative Tribunals: Constitution, Procedure and Appeals* (8th Report, 1975) 21.

[108] *Supra* n. 99, at 23.

5.138 However, the Legislature of New Zealand has provided for interim orders in judicial review proceedings declaring what the Crown ought not to do.[109] Of the New Zealand provision it has been said:

> Although it may be doubted whether the Legislature's refusal to permit the issue of binding interim orders against the Crown is warranted, the interim declaratory order will almost certainly achieve the desired object. There is no reason to doubt that the Crown will respect and comply with the terms of an interim declaration in the same way as it complies with a final declaratory order.[110]

5.139 Another commentator has observed as follows:

> The innovation in the 1977 Amendment Act cleverly maintains the Crown's immunity from coercive control pending litigation, thus allowing the Crown freedom to disobey an interim order should the Crown feel it could later justify such disobedience as being in the public interest. This satisfies one of the traditional reasons for the Crown's immunity from injunction. However at the same time the individual litigant's interests will be protected in the absence of a publicly justifiable reason for non-compliance. . . .
>
> Another aspect of the section 8(2) relief which should not be overlooked is the fact that the court has a discretion as to whether or not to issue the interim order. It is submitted that the court, as well as employing an approach analogous to that with respect to the discretion to issue interim and interlocutory injunctions, will also balance the competing public interests - the possible public interest in the government being able to act free from court restraint in the circumstances and the public interest in the applicant being protected from possible further interference with his rights pending the final determination of the application.[111]

5.140 We make our proposal mindful of the doubts which have been expressed as to the logical character of a provisional declaration. It is our view that empowering the Court to declare the terms of an interim order - what ought to be done or not done - as opposed to making an interim declaration of "rights", is not an affront to logic. Furthermore, we believe that the benefits of making available such relief outweigh the merits of any objection to the logical character of an interim declaratory order. Accordingly, we recommend:

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[109] NZ, s. 8(2).

[110] J.A. Smillie, "The Judicature Amendment Act 1977", [1978] N.Z.L.J. 232 at 238.

[111] B.V. Harris, *supra* n. 106, at 103-104.

RECOMMENDATION 21

That the Court be empowered under the Act to declare the terms of an interim order against the Crown and those Crown officers immune from injunctive relief.

5. Damages

5.141 As indicated in our introductory Chapter, the question as to whether reform is required respecting the basis upon which damages for unlawful administrative action may be awarded is beyond the scope of this Report. However, insofar as damages are at present available for loss resulting from illegal administrative activity, should provision be made for damages to be awarded under our proposed judicial review legislation?

5.142 Under the existing law, damages are sought by way of action. A claim for damages may be included in an action for a declaration or injunction, but not in an application for prerogative relief.

5.143 Proof of *ultra vires* action *per se* is generally insufficient to support a claim for damages;[112] an independent cause of action must be established. For example, an action for damages against an administrative authority may be founded upon the commission of an intentional tort (trespass, assault, false imprisonment),[113] an economic tort (intimidation, unlawful interference with contractual relationship or economic interests),[114] nuisance,[115] or negligence.[116] As well, damages may be awarded for malicious or deliberate abuse of authority ("misfeasance in public office")[117] and for infringement or denial of constitutional rights and freedoms.[118] An action for damages may also be instituted for breach of contract.

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[112] *Welbridge Holdings Ltd.* v. *The Metropolitan Corporation of Greater Winnipeg*, [1971] S.C.R. 957; *Berryland Canning Co. Ltd.* v. *The Queen* (1974), 44 D.L.R. (3d) 568 (F.C., T.D.); *Takaro Properties Ltd. (in receivership)* v. *Rowling*, [1978] 2 N.Z.L.R. 314 (C.A.); *Dunlop* v. *Woollahra Municipal Council*, [1982] A.C. 158 (P.C.); *B.G. Ranches Ltd.* v. *Manitoba Agricultural Lands Protection Board* (1983), 1 Admin. L.R. 105 (Man. Q.B.). *But cf. McGillivray* v. *Kimber* (1915), 52 S.C.R. 146; *Wood* v. *Blair*, The Times, 3, 4, 5, July 1957 (C.A.); *Noel & Lewis Holdings Ltd.* v. *The Queen* (1983), 1 Admin. L.R. 290 (F.C., T.D.).

5.144 We expect that circumstances in which it would be appropriate to seek damages under the proposed judicial review Act would be rare. First, as a matter of procedure, summary proceedings[119] would often be inappropriate;

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[113] *Beatty* v. *Kozak*, [1958] S.C.R. 177; *Blundell* v. *Attorney-General*, [1968] N.Z.L.R. 341 (C.A.); *Sulisz* v. *Flin Flon*, [1979] 3 W.W.R. 728 (Man. Q.B.); *Pearlman* v. *City of Winnipeg* (1984), 29 Man. R. (2d) 52 (C.A.).

[114] *Gershman* v. *Manitoba Vegetable Producers' Marketing Board*, [1976] 4 W.W.R. 406 (Man. C.A.).

[115] *City of Portage la Prairie* v. *B.C. Pea Growers Limited*, [1966] S.C.R. 150; *Bjarnarson* v. *Government of Manitoba* (1984), 31 Man. R. (2d) 161 (Q.B.), aff'd (1985), 37 Man. R. (2d) 97 (C.A.) (affirming liability on alternative basis of negligence).

[116] *Porky Packers Ltd.* v. *Town of The Pas* (1974), 46 D.L.R. (3d) 83 (Man. C.A.), rev'd (1976), 65 D.L.R. (3d) 1 (S.C.C.); *Anns* v. *Merton London Borough Council*, [1978] A.C. 728 (H.L.); *City of Kamloops* v. *Nielsen*, [1984] 2 S.C.R. 2.

[117] *Roncarelli* v. *Duplessis* (1959), 16 D.L.R. (2d) 689 (S.C.C.); *Gershman* v. *Manitoba Vegetable Producers' Marketing Board*, *supra* n. 114; *Dunlop* v. *Woollahra Municipal Council*, *supra* n. 112; *Bourgoin SA* v. *Ministry of Agriculture Fisheries and Food*, [1985] 3 All E.R. 585 (Q.B.D. and C.A.), leave to appeal to House of Lords granted.

[118] D. Gibson, "Enforcement of the Canadian Charter of Rights and Freedoms" in *The Canadian Charter of Rights and Freedoms* (W.S. Tarnopolsky and G.-A. Beaudoin ed. 1982); M.L. Pilkington, "Damages as a Remedy for Infringement of the Canadian Charter of Rights and Freedoms" (1984), 62 Can. Bar Rev. 517; *Collin* v. *Lussier*, [1983] 1 F.C. 218 (T.D.), rev'd with respect to award of damages on evidentiary and procedural grounds, [1985] 1 F.C. 124 (C.A.).

[119] In Recommendation 25, we conclude that judicial review under our proposed Act should be sought in summary proceedings instituted by an originating notice of motion. Note, however, Q.B.R., r. 539(1) which empowers the Court to direct the trial of any question raised on the hearing of an application.

an action with full pre-trial and trial process would be more suitable for the proof and assessment of damages.[120] Secondly, our proposed legislation is designed for cases in which *direct* review of an administrative act or decision is sought; it is not generally suitable for collateral challenges. Although the question of whether an administrative act is *ultra vires* will often be of relevance in proceedings for damages, liability would be based on tortious or contractual principles, rather than purely on principles of administrative law. That is, liability for damages would not generally flow automatically from a finding that an administrative act was invalid.

5.145 Nevertheless, there may be cases in which the grounds which establish entitlement to a judicial review remedy coincide with the 'grounds' which establish entitlement to damages (e.g. bad faith, malice or, in some instances, breach of the *Canadian Charter of Rights and Freedoms*). In such circumstances, to require the applicant to commence a separate action for damages based on the same fact situation might result in an unnecessary and costly duplication of proceedings. As observed by The Law Commission in England,

> . . . there may be cases where the court, having decided in exercise of its review jurisdiction that illegality has occurred, and being satisfied that the claim for damages is one recognized by the law, may find that there is no remaining dispute that the damage resulted from the illegality or as to the fact or extent of damage or as to the quantum of damages. In such a case . . . the Court should on an application for judicial review have power to make an award of the damages.[121]

5.146 As well, it is to be recalled that Queen's Bench Rule 539(1) empowers the Court to direct the trial of any question raised on the hearing of an application. In the course of judicial review proceedings, should the issues raised by the claim for damages require full trial process, it would be open to the Court to invoke this procedural option.

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[120] *See e.g., Re Seaway Trust Co. and The Queen in Right of Ontario* (1983), 146 D.L.R. (3d) 620 (Ont. C.A.), rev'g (1983), 146 D.L.R. (3d) 586 (Ont. Div. Ct.).

[121] The Law Commission (England), *supra* n. 99, at 25.

5.147 We note that the judicial review legislation introduced in Ontario, New Zealand and British Columbia does not provide for the awarding of damages. This omission has been the subject of critical comment.[122] In England, however, provision has been made for the joining of a claim for damages with an application for judicial review.[123]

5.148 We wish to emphasize again that, for reasons of both procedure and substance, it would not often be appropriate to seek damages under our proposed legislation. However, occasions may arise where it would be just and convenient for damages to be sought in conjunction with judicial review proceedings. Our objective of providing a single procedure under which all forms of suitable relief are available would best be served by allowing a claim for damages to be joined with an application for an order upon review.

5.149 We are of the view that to permit the inclusion of a claim for damages, particularly in light of the Court's powers under Queen's Bench Rule 539(1), would provide a desirable degree of procedural flexibility. This would be an improvement over the situation in which the applicant would be forced to institute a separate action for damages in all cases. As well, the judicial review legislation would then also be equipped to accommodate any future developments in the law respecting the awarding of damages for loss resulting from *ultra vires* activity.[124]

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[122] J. A. Smillie, *supra* n. 110, at 240; M.T. MacCrimmon, "The British Columbia Judicial Review Procedure Act: Procedural Means for Obtaining Judicial Review" in *Proceedings of the Administrative Law Conference, University of British Columbia* (1979) 141.

[123] Eng Rules, r. 7.

[124] There is some speculation that the "tort of misfeasance in public office" may develop into a cause of action based on the *ultra vires* principle. *See e.g., Farrington* v. *Thomson*, [1959] V.R. 286 (S.C.); B. Gould, "Damages as a Remedy in Administrative Law" (1972), 5 N.Z.U.L. Rev. 105. *But cf. Dunlop* v. *Woollahra Municipal Council, supra* n. 112.

5.150 Three points deserve emphasis, however. First, the power of the Court to award damages should be the subject of a separate provision in the legislation; damages should not simply be listed as one form of relief which may comprise an order upon review. Secondly, the availability of damages should clearly be limited to situations where damages would have been available had an action been commenced. These two matters are of importance because: the proposed rules of standing are not applicable to claims for damages; the principles upon which damages are awarded generally differ from the grounds upon which other forms of relief are available; and damages may be awarded only against a suable entity. Thirdly, damages should be available under the Act only when sought in conjunction with another form of relief. Where damages alone are being claimed, no purpose would be served by allowing for proceedings to be commenced under the judicial review legislation.

5.151 Accordingly, we recommend:

RECOMMENDATION 22

That the Court be empowered under the Act to award damages to an applicant where the applicant has included in his application for an order upon review a claim for damages arising from any matter to which the application relates and the Court is satisfied that the applicant would have been entitled to damages had he commenced an action therefor at the time of making his application.

F. PROCEDURE

1. The Court

5.152 As stated earlier in this Report, judicial review traditionally lies within the inherent supervisory jurisdiction of a superior court. In Manitoba, this jurisdiction is exercised by the Court of Queen's Bench.

5.153 The Commission has considered whether it would be appropriate to recommend the creation of a separate court or a separate administrative law division of the Court of Queen's Bench. Associated with both the Ontario and New Zealand reforms in judicial review was the creation of such a division with certain responsibility for administrative law matters, whether arising by way of judicial review or statutory appeal.

5.154 It is our view that the entire Court of Queen's Bench should continue to exercise supervisory jurisdiction in judicial review. We think that the creation of a separate court or separate division of the Court is unnecessary in Manitoba, at least at this time. The present volume of judicial review applications does not warrant the creation of a new court. As well, the problem of clearly delineating the administrative law jurisdiction of a separate court, or separate division of a court, overrides any possible benefits, such as the development of greater expertise in this area. We recommend:

RECOMMENDATION 23

That jurisdiction under the proposed Act be exercised by the Court of Queen's Bench for Manitoba.

2. Limitation Period

5.155 We do not propose that the Act adopt a fixed limitation period for bringing an application for an order upon review.[125] Where an applicant has unduly delayed instituting review proceedings, particularly if the granting of relief at such time would be detrimental to persons who have relied upon the impugned decision in the interim, the Court could choose to exercise its discretion to refuse relief, as it now does at common law (see Recommendation 19). We believe that this discretionary approach provides an adequate safeguard against the hardship and prejudice which may result from unnecessary delay, and strikes a fair balance between the interests of finality and certainty, and the interests of fairness and legality, in the administrative process. We recommend:

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[125] *Compare* Eng Rules, r. 4(1) (3-month limitation period which may be extended by the court), NB, r. 69.03 (3-month limitation period which may be extended by the court), Aust, s. 11 (general 28-day limitation period which may be extended by the court) and Alta, r. 753.11(1) (6-month limitation period for order to set aside decision) *with* Ont, BC, NZ and Barb (no general limitation periods).

The "catch-all" six-year limitation period in *The Limitation of Actions Act*, C.C.S.M. c. L150, s. 3(1)(*l*) is inapplicable to judicial review proceedings, at least where the administrative act or decision is alleged to be invalid: *Re Mid-West By-Products Co. and Clean Environment Commission*, *supra* n. 18. *Quaere* whether a limitation period in the proposed judicial review legislation could be effective to bar review of *ultra vires* activity.

Note, however, that by virtue of the conditions adopted in Recommendation 22, the general limitation periods for actions would apply to the awarding of damages under the proposed Act.

RECOMMENDATION 24

That the Act contain no fixed limitation period for bringing an application for an order upon review.

3. Institution of Proceedings

5.156 Normally, in judicial review proceedings, the facts are not in dispute; rather, the issues raised involve questions of law. Accordingly, we are of the view that an order upon review should be sought by the same summary procedure which currently applies to the prerogative orders. That is, proceedings should be instituted by an originating notice of motion. Such a procedure has the advantage of being relatively simple, expeditious and inexpensive.

5.157 Where proceedings are instituted by originating notice of motion, evidence would normally be given by affidavit, as provided in Q.B.R., r. 228. The affidavit would generally be limited to facts within the knowledge of the deponent (Q.B.R., r. 262) and cross-examination on the affidavits would be permitted under Q.B.R., r. 229. The Court would continue to have the discretion to permit *viva voce* testimony in exceptional circumstances.[126] Subject to leave, the originating notice should be served at least 7 days in advance of the hearing (Q.B.R., r. 149(2)).

5.158 Where facts are in dispute or the nature of the evidence is complex, the Court could order the trial of any issue in accordance with Q.B.R., r. 539(1). The existing power of the Court to order the trial of an issue would allow for a desirable element of procedural flexibility in judicial review proceedings.

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[126] *See Re Mid-West By-Products Co. and Clean Environment Commission, supra* n. 18.

5.159 All of these matters are now adequately provided for by the Queen's Bench Rules in relation to originating notices and motions generally. There are, however, two limited reforms which we would recommend. The first pertains to the contents of the application. We think that the application for review should include the nature of the specific grounds upon which the applicant seeks review and the nature of the relief sought, as well as a reference to the affidavits or other evidence intended to be used in support. The present form of originating notice set out in the Rules (Form 15) may not adequately convey that it is necessary to specify therein the grounds of review. We think therefore that the Act should contain an express provision regarding the contents of an application for an order upon review.

5.160 The second reform which we would recommend is with respect to a provision for the discovery of documents in proceedings for an order upon review. At present, there is no specific rule providing for the Court to order the production of documents where proceedings are commenced by originating notice of motion; instead, the Rules pertaining to the production of documents confine their ambit to proceedings commenced by way of action.[127] We think that there should be a specific section in the proposed Act authorizing the Court to order the discovery of documents where it deems it appropriate. The right to discovery would not be automatic as for actions,[128] but would be founded upon court order. A similar provision is now contained in the English Rules governing applications for judicial review[129] and has been commended by the House of Lords.[130] In Canada, the provision for discovery of documents in judicial review applications has been described as "essential".[131]

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[127] *See* Q.B.R., r. 311 *et seq*.

[128] Q.B.R., r. 311 provides for the production of documents upon service of notice thereof.

[129] Eng Rules, r. 8

[130] *See O'Reilly* v. *Mackman*, [1982] 3 W.L.R. 1096 (H.L.).

[131] M.T. MacCrimmon, *supra* n. 122, at 103.

5.161 Our recommendations regarding the procedure to be used on an application for an order upon review are as follows:

RECOMMENDATION 25

That an application for an order upon review under the Act be commenced by originating notice of motion.

RECOMMENDATION 26

That, subject to Recommendations 27 and 28, the provisions in The Queen's Bench Rules governing originating notices of motion apply to an application for an order upon review.

RECOMMENDATION 27

That there be a provision in the Act stating that the contents of an application for an order upon review shall include notice of

(a) the specific grounds upon which the applicant seeks relief;

(b) the nature of the relief sought; and

(c) the affidavits or other evidence intended to be used in support of the application.

RECOMMENDATION 28

That the Court be empowered under the Act to order the discovery of documents where it deems it appropriate to do so.

4. Filing of Record and Other Material

5.162 Earlier in this Chapter (Recommendation 12), we recommended that the proposed Act expressly define "record" to include any reasons given by the tribunal for its decision. We also expressed the view that the definition of "record" should not be further expanded to include documents beyond those comprising the record at common law. We now address the procedure which should be followed regarding the filing of the record.

5.163 Under Ontario's judicial review legislation, filing of the tribunal's record is mandatory upon the tribunal receiving notice of an application for judicial review of the exercise of a statutory power of decision.[132] In contrast, the corresponding legislation in British Columbia[133] empowers the court to direct that the record, or part thereof, be filed in court. It is to be noted that in British Columbia, the record is defined as including a transcript (if any) of oral evidence and any documents produced in evidence at the hearing before the tribunal.

5.164 We are of the view that a provision automatically requiring the tribunal to file with the Court all the material in its possession which relates to the matter under review is not necessary. First, copies of the relevant material will often be appended to the applicant's affidavit. Secondly, depending on the grounds of review relied upon in the application, only portions of the material in the tribunal's possession may be relevant to the issues raised. The mandatory filing of all material in all cases may therefore result in the unnecessary duplication of paper and the submission of irrelevant material to the Court. In most cases, it will be possible for the parties to agree on the documents which should be filed in Court. Accordingly, we are of the view that the applicant should notify the tribunal that he wishes specified materials to be filed. Such a request should be included in the judicial review application. In the vast majority of cases, it is expected that the tribunal will willingly comply with the applicant's request. Should a dispute arise, an application could be made to the Court for a determination of the material which should be returned by the tribunal. It would also be desirable to permit the Court on its own motion to order the production of any additional material in the tribunal's possession. We recommend:

RECOMMENDATION 29

That the Act provide that the tribunal file in the Court

(a) the record of the hearing, if any, in which the decision was made;

(b) any exhibit, affidavit or other document filed during any such hearing before the tribunal;

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[132] Ont, s. 10.

[133] BC, s. 17.

(c) the transcript, if any, of the oral evidence given during any such hearing before the tribunal;

where a party to the application so requests, or where the Court, upon application or its own motion, so directs.

5. Conversion of Proceedings

5.165 Under the proposed Act, the Court is empowered to grant relief which corresponds to that at present available upon an application for a prerogative order of certiorari, prohibition or mandamus, i.e., an order quashing a decision; an order prohibiting the doing of an act or the making of a decision; or an order compelling the doing of an act or the making of a decision. With respect to matters governed by the Act, it would be unnecessarily complex and superfluous to preserve these prerogative remedies alongside of the new statutory procedure; it is intended that the order upon review replace the prerogative remedies with respect to the review of administrative decisions. However, we do not advocate the outright abolition of the prerogative orders; they must remain available for the review of matters to which the Act does not apply, whether by design (e.g. a decision arising in relation to a criminal offence or an offence under provincial law which we recommended be outside the scope of the proposed Act; see Recommendation 6) or, to contemplate a most undesirable eventuality, by an overly restrictive interpretation of the Act's scope. Accordingly, we make a more limited proposal, which should nevertheless result in the Act supplanting the prerogative remedies in all but the criminal and quasi-criminal setting: any application for an order of certiorari, prohibition or mandamus in relation to a decision to which the Act applies should be treated as if it were an application for an order upon review.[134]

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[134] To the extent that motions to quash inferior court proceedings in relation to civil matters are governed by Q.B.A., s. 95, it may be desirable to provide as well that applications for such relief are to be treated as applications for an order upon review.

5.166 The Court is also empowered under the proposed Act to grant relief which corresponds to that at present available in proceedings for a declaration or an injunction, i.e., an order declaring the rights of the parties or the validity of a decision, or an order prohibiting or compelling the doing of an act or the making of a decision. Where a declaration is sought by originating notice of motion pursuant to Q.B.R., r. 536 with respect to a decision to which the Act applies, the application should be treated as an application for an order upon review. This would avoid unnecessary duplication of procedure, as declaratory relief is available by summary procedure under our proposed statutory remedy.

5.167 The relationship between proceedings under the proposed Act and the present option of seeking declaratory and injunctive relief by way of action poses a more difficult problem. On the one hand, it would be desirable to preserve actions for these remedies - even though instituted for the purpose of reviewing decisions to which the Act applies - alongside of the new statutory procedure. In cases where the benefits of an ordinary civil action (full discovery and trial process) are essential to the complainant's case, it would be simpler to permit the complainant to proceed directly by way of action rather than to require that he first make application for judicial review under the Act and then ask the Court to direct a trial of the issues under Q.B.R., r. 539(1). As well, should a complainant be uncertain as to whether his suit falls within the scope of the Act or not, he could safely proceed by way of action outside of the Act.

5.168 On the other hand, to retain the option of seeking judicial review otherwise than under the Act undermines the goal of creating a single uniform procedure for the review of all administrative decisions. As well, the substantive reforms embodied in the new Act would not necessarily be applied in actions instituted outside of the Act.

5.169 It appears to us that there is no completely satisfactory solution to this issue. On balance, we have concluded that, where a plaintiff commences an action via statement of claim, seeking injunctive or declaratory relief in relation to a decision to which the Act applies, the Court should be empowered to direct that such an action be treated and disposed of as if it were an application for an order upon review. The Acts of Ontario, British Columbia and New Zealand all generally allow a court to 'convert' such actions into judicial review applications.[135]

5.170 Conversely, the Court should be empowered to 'convert' an application wrongfully brought under the proposed Act, directing that it be continued by action or otherwise. Permitting such a continuation is preferable to dismissing the application and requiring the applicant to institute a new proceeding. Provision for such a conversion has been made in England and has also been recommended by the Alberta Institute of Law Research and Reform.[136]

5.171 We recommend:

RECOMMENDATION 30

That any application for an order of mandamus, prohibition, certiorari or declaration in relation to a decision to which the Act applies be treated as if it were an application for an order upon review.

RECOMMENDATION 31

That the Court, on application or its own motion, be empowered to direct that an action for a declaration or injunction, or both, whether with or without a claim for other relief, be continued as an application for an order upon review under the Act where the action is brought in relation to a decision to which the Act applies.

RECOMMENDATION 32

That the Court, on application or its own motion, be empowered to direct that an application for an order upon review under the Act be continued by action or otherwise where the application is brought in circumstances where the Act does not apply.

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[135] Ont, s. 8; BC, s. 13; NZ, s. 7. *See also* Alta, r. 753.16(1).

[136] Eng Rules, r. 9(5); Alta, r. 753.16(2); *cf.* Barb, s. 3(2). For an application of the English rule, *see e.g.*, *R.* v. *British Broadcasting Corporation, Ex parte Lavelle*, [1983] 1 W.L.R. 23 (Q.B.D.).

RECOMMENDATION 33

That where the Court directs the conversion of proceedings under Recommendation 31 or 32, it be empowered to give such further directions as it deems necessary to cause the proceedings to conform to the procedure by which they are to be continued.

G. PARTIES TO AN APPLICATION

1. Service and Naming of Parties

5.172 Every person who appears to be interested in, or is likely to be affected by, the review proceedings should be served with notice of the application for an order upon review.[137] This would include, at minimum, the parties directly involved in the administrative proceedings at the tribunal level, as well as the tribunal itself.[138]

5.173 The applicant should name as a party to the review proceedings anyone he wishes to be bound by the order upon review. This will normally include the other party to the impugned administrative proceedings, that is, the side that won at the administrative level.[139] Where the administrative proceeding being challenged was not adversarial in nature, so that there is no "other side", it may, in certain circumstances, be proper to name as a party the Attorney-General of Manitoba.[140] The tribunal whose decision is being reviewed should also be named as a party,[141] but not the members of the tribunal in their personal capacity.

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[137] *Cf*. Alta, r. 753.9(1); Eng Rules, r. 5(3); Sask, r. 667(1).

[138] *Cf*. BC, s. 15(1); NB, r. 69.05(1).

[139] *See e.g.*, *Re Canadian Human Rights Commission and Eldorado Nuclear Ltd*. (1980), 114 D.L.R. (3d) 154 (F.C.A.); *City of Brandon* v. *Manitoba Human Rights Commission* (1981), 14 Man. R. (2d) 6 (C.A.).

[140] *See Re Castel and Criminal Injuries Compensation Board* (1978), 89 D.L.R. (3d) 67 (Man. C.A.).

[141] *Re Canada Labour Relations Board and Transair Ltd*. (1976), 67 D.L.R. (3d) 421 (S.C.C.) (in the context of certiorari proceedings). *Cf*. *R*. v. *Petursson* (1969), 12 D.L.R. (3d) 509 (Man. Q.B.). *See also* Ont, s. 9(2); BC, s. 15(1); NZ, s. 9(4).

5.174 Our views with respect to service and parties conform with the general practice in the province in summary proceedings for prerogative and declaratory relief, and, indeed, with common sense as well. The restriction which now pertains to actions for declarations and injunctions - that the defendant body be a suable entity - should be of no relevance to proceedings instituted by originating notice under the Act (except in the limited context of damages being awarded in addition to an order upon review). For these reasons, we do not view it as necessary for the Act to contain provisions relating generally to the service of notice and the naming of respondents to an application for an order upon review.

2. The Role of the Tribunal

5.175 To what extent should a tribunal be permitted to defend or explain its actions which are the subject of challenge in judicial review proceedings? It is generally stated that a tribunal is limited to an explanatory role with reference to the record of its proceedings and to the making of representations relating to its jurisdiction.[142] A tribunal may appeal from an adverse decision of the reviewing court, but its right to launch an appeal or to be heard on appeal is similarly limited to jurisdictional issues.[143] In this context, the concept of "jurisdiction" has been narrowly defined: it does not encompass questions of whether the tribunal has acted in accordance with the principles of natural justice and procedural fairness.[144] It is said that issues relating to natural justice and non-jurisdictional matters should be fought out by the parties who were involved in the proceedings before the tribunal. Where there is only one such party, it may be appropriate, in some circumstances, to add the Attorney-General as a party "so that the tribunal will not be put in the invidious position where it has to argue against the applicant as to how right its decision was".[145]

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[142] *The Labour Relations Board of the Province of New Brunswick* v. *Eastern Bakeries Limited*, [1961] S.C.R. 72; *Northwestern Utilities Limited* v. *The City of Edmonton*, [1979] 1 S.C.R. 684. The common law position may, however, be altered by specific legislative provision in relation to a particular tribunal; *see e.g.*, *The Labour Relations Act*, C.C.S.M. c. L10, s. 121.3(9).

[143] *The Labour Relations Board of Saskatchewan* v. *Dominion Fire Brick and Clay Products, Limited*, [1947] S.C.R. 336; *Re Canada Labour Relations Board and Transair Ltd.*, *supra* n. 141; *United Brotherhood of Carpenters and Joiners of America, Local 1928* v. *Citation Industries Ltd*. (1984), 11 Admin. L.R. 204 (B.C.C.A.); *Isabey* v. *Health Services Commission (Man.)* (1986), 40 Man. R. (2d) 198 (C.A.).

5.176 Arguments in favour of limiting the tribunal's involvement in judicial review proceedings and appeals therefrom place emphasis on the importance of preserving the tribunal's dignity and impartiality:

> . . . [A]rgument [by counsel for an administrative board] should be addressed not to the merits of the case as between the parties appearing before the Board, but rather to the jurisdiction or lack of jurisdiction of the Board. If argument by counsel for the Board is directed to such matters as we have indicated, the impartiality of the Board will be the better emphasized and its dignity and authority the better preserved . . . .[146]

In a similar vein, the Supreme Court of Canada has expressed the view that

> . . . active and even aggressive participation [by a tribunal through its counsel] can have no other effect than to discredit the

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[144] *Re Canada Labour Relations Board and Transair Ltd.*, *supra* n. 141, per Spence J. (in dissent, but for the majority on this point); *Northwestern Utilities Limited* v. *The City of Edmonton*, *supra* n. 142.

[145] *Re Castel and Criminal Injuries Compensation Board*, *supra* n. 140, at 68 (Man. C.A.). This case involved appellate, rather than review, proceedings respecting an alleged error of law, but the principle seems applicable to review proceedings as well.

[146] *International Association of Machinists* v. *Genaire Ltd.* (1958), 18 D.L.R. (2d) 588 at 589-590 (Ont. C.A.), quoted with approval in *Re Canada Labour Relations Board and Transair Ltd.*, *supra* n. 141, at 439 and in *Northwestern Utilities Limited* v. *The City of Edmonton*, *supra* n. 142, at 710.

> impartiality of an administrative tribunal either in the case where the matter is referred back to it, or in future proceedings involving similar interests and issues or the same parties. . . . [I]t abuses one's notion of propriety to countenance its participation as a full-fledged litigant in this Court, in complete adversarial confrontation with one of the principals in the contest before the Board itself in the first instance.[147]

5.177 In this context, an analogy is sometimes drawn between administrative tribunals and courts. To permit a tribunal to participate as a full party in review proceedings is likened to permitting a trial judge to argue on appeal from one of his or her own decisions - a spectacle viewed as unseemly and unthinkable.[148]

5.178 The policy of limiting the role of tribunals to the making of representations relating solely to jurisdiction (defined to exclude questions of natural justice) has been the subject of extensive criticism by legal commentators.[149] Before surveying the concerns which have been expressed, it may be useful to remind ourselves of the factors which lead to the creation of administrative agencies and the assignment of functions to them. The reasons are various, but one common factor involves a determination that ordinary courts are not well suited to perform the particular function in question. This unsuitability may rest in the nature of the function itself: licensing, regulatory and advisory duties are three examples. Even where the function is arbitral or adjudicative, the subject matter may call for technical expertise or professional experience not normally possessed by members of the judiciary. Or, the need for an informal and expeditious decision-making process may suggest that a function be assigned to an administrative agency rather than to a court.

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[147] *Northwestern Utilities Limited* v. *The City of Edmonton*, *supra* n. 142, at 709.

[148] *Re City of Dartmouth* (1976), 17 N.S.R. (2d) 425 (S.C., App. Div.) (appeal by way of case stated); *Re Workmen's Compensation Board of Nova Scotia and Treige* (1976), 72 D.L.R. (3d) 246 (N.S.S.C., App. Div.).

[149] *See e.g.*, D.J. Mullan, "Recent Developments in Nova Scotian Administrative Law" (1978), 4 Dalhousie L.J. 467 at 486-497; E. Campbell, "Appearances of Courts and Tribunals as Respondents to Applications for Judicial Review" (1982), 56 Austl. L.J. 293; M.G. Picher, "Adjudicator, Administrator or Advocate? The Role of the Labour Board in Judicial Review Proceedings" (1984), 62 Can. Bar Rev. 22.

5.179 The purpose of the above digression is two-fold. First, it undermines to some extent the court/tribunal analogy relied upon by those who advocate a limited role for tribunals in review proceedings - an analogy described by one writer as "rather tenuous".[150] Administrative tribunals are not courts of law; in respect of the matters for which they are responsible and the procedures which they adopt, they may differ significantly from courts of first instance. Also, appellate or reviewing courts may not have the same clear understanding of the administrative process as they do of the situation before trial courts. Accordingly, references to the impropriety of a judge arguing on appeal from his or her own decision contribute little to the resolution of the issue at hand.

5.180 Secondly, in exercising their specialized jurisdiction, administrative bodies develop considerable experience and expertise in their assigned fields of endeavour. Therefore, they constitute a valuable resource for the courts in gaining insight into the realities of the administrative process. Professor Mullan has framed the issue of tribunal participation in judicial review proceedings in the following terms:

> At base, the question has to be whether the tribunal is able to contribute anything to the satisfactory resolution of issues that are raised in review applications, . . . and the answer to that question seems fairly obvious. The tribunal in most instances is going to be far more familiar with its empowering statute and its history and purposes than the reviewing court. It is also going to be far more familiar with the legal issues that confront it in its day to day activities. As a result, its explanation of why it assumed jurisdiction in a particular matter or why it has given a section of its empowering Act a certain reading is likely to be extremely useful to the court, if that court wants to be able to perform its task in as informed a manner as possible. The same is also obviously true of

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[150] A.J. Roman, *Annotation to United Brotherhood of Carpenters and Joiners of America, Local 1928 v. Citation Industries Ltd.*, *supra* n. 143, at 205.

> situations where procedural unfairness is alleged. Given the flexibility of the rules of natural justice and the search that is involved in trying to strike a balance between the demand of those affected for procedural protections and the tribunal's legitimate concern for efficient, effective decision-making, it surely seems incumbent on the court to allow the tribunal to explain why certain procedures have or have not been adopted.[151]

It is in recognition of administrative tribunals' experience and expertise that courts have recently developed the "patently unreasonable" standard of review for intra-jurisdictional questions of law (discussed in Chapter 2 of this Report). It would not seem entirely consistent to acknowledge that expertise, and then to disallow the tribunal from sharing with the court its insights into the questions of law and procedure which arise in the day-to-day discharge of its assigned functions.[152]

5.181 In circumstances where, in addition to the applicant, there is a private party who assumes an active role as respondent in judicial review proceedings, participation by the tribunal may be regarded as an unnecessary duplication. It is true that, in some cases, the interests of the private co-respondent may correspond with the interests of the tribunal, and that the tribunal's position would be adequately represented by that party; however, this is not invariably so. First, the co-respondent may not be fully aware of the practical exigencies or policy considerations which led the tribunal to adopt the impugned procedures or impugned interpretations of its governing statute. Secondly, the co-respondent's primary goal will often be to obtain a favourable judgment in the particular case. The tribunal's main concern may centre upon the precedential impact of the court's rulings on the tribunal's future operations, a concern which the private litigants may or may not share. A tribunal should not be regarded merely as a disinterested decision-maker; it is also an administrative body responsible for the overall effectiveness of the administrative process and for the management of a specialized area of law and policy in accordance with its legislative purpose. As the designated guardian of the administrative process, it may have a unique perspective to present to the court in review proceedings.

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[151] D.J. Mullan, *supra* n. 149, at 494.

[152] *See Bibeault* v. *McCaffrey*, *infra* n. 161.

5.182 It has been suggested that participation by the Attorney-General may serve to fill the gap created by the limitations which have been placed on the tribunal's involvement in review proceedings. Where there is no other respondent to assume the role of adversary in review proceedings, or where the interests of the co-respondent may not adequately reflect all the issues in the case, courts have indicated that it may be appropriate for the Attorney-General to appear to ensure that the public interest will be represented, particularly with respect to those issues which the tribunal is disallowed from addressing.[153] In reply to this suggestion, Professor Mullan has observed that "[t]he position of the Attorney-General really only serves as a smokescreen to the real issue".[154] Does it really matter, he asks, whether the lawyer from the Attorney-General's Department is appearing in his capacity as counsel for the tribunal or as counsel for the Attorney-General? Indeed, at least one court has responded to this "charade" by imposing the same restrictions upon counsel appearing on behalf of the Attorney-General as were imposed upon counsel making representations on behalf of the tribunal.[155]

5.183 On the other hand, it is not necessarily the case that the public interest as represented by the Attorney-General will be identical to the interest of the tribunal. The most obvious example of this is where the Attorney-General appears, not in support of the tribunal's position, but as the *applicant* (either *ex proprio motu* or *ex relatione*) in the judicial review proceedings. Furthermore, even in situations where the Attorney-General appears (or could appear) as respondent, there may be cases where the stance taken by the tribunal differs significantly from the position adopted (or likely to be adopted) by the Attorney-General or where their interests do not entirely coincide.[156]

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[153] *Re Castel and Criminal Injuries Compensation Board*, *supra* n. 140; *Re City of Dartmouth*, *supra* n. 148; *Re Energy Probe and Atomic Energy Control Board* (1984), 8 D.L.R. (4th) 716 (F.C., T.D.), aff'd (1984), 15 D.L.R. (4th) 48 (F.C.A.).

[154] D.J. Mullan, *supra* n. 149, at 496.

[155] *United Brotherhood of Carpenters and Joiners of America, Local 1928* v. *Citation Industries Ltd.*, *supra* n. 143 (in which a single counsel represented both the Employment Standards Board and the Attorney General of British Columbia). *But cf. Re Energy Probe and Atomic Energy Control Board*, *supra* n. 153.

5.184 Accordingly, we are not convinced that the joining of the Attorney-General as a party provides a complete or satisfactory resolution to the issue of the proper role of an administrative tribunal in judicial review proceedings. Where the interests of the Attorney-General and the tribunal coincide, it appears somewhat artificial or arbitrary to gauge the scope of permissible argument by the colour of Crown Counsel's hat. Where their interests diverge, appearance by the Attorney-General leaves unanswered the question of the extent to which the tribunal's views should be presented to the reviewing court.

5.185 One final point should be noted in surveying the arguments on both sides of the issue of tribunal involvement. Admonitions that a tribunal should not speak to the merits of its decision, while of possible relevance to appeals, have no bearing in the context of judicial review proceedings. Review is not an appeal on the merits; upon review, the issues are confined to questions of jurisdiction, including natural justice, and questions of law. Concerns that participation by the tribunal will be seen to compromise its objectivity and impartiality seem somewhat overstated in this limited contextual framework.

5.186 The Commission is of the view that any strict rule of law which prohibits a tribunal, in judicial review proceedings, from addressing issues other than those relating to its own jurisdiction (as narrowly defined) is undesirable and insupportable in principle. However, it is our conclusion that our proposed Act should not contain a provision delineating the appropriate role of tribunals in review proceedings.

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[156] *See e.g.*, *Re Energy Probe and Atomic Energy Control Board*, *supra* n. 153; *Re Blainey and Ontario Hockey Association* (1986), 26 D.L.R. (4th) 728 (Ont. C.A.) (*Charter* challenge to constitutionality of tribunal's governing legislation).

5.187 Our reasons for declining to make a positive recommendation in this regard are essentially three-fold. First, we are of the opinion that the appropriate extent of tribunal participation must depend upon the circumstances of each case; no general rule can be devised. In assessing the tribunal's role in a particular case, many factors must be considered and balanced, including the following:

(a) Is the tribunal likely to be of assistance to the court in coming to a satisfactory resolution of the issues?

(b) Is there an active co-respondent who can adequately address all the issues of the case including, where relevant, the long-term consequences of a particular court ruling?

(c) Does the case bear only upon the interests of the private parties, or may the outcome seriously affect the tribunal's future policies and proceedings?

(d) What is the nature of the tribunal and what particular grounds are being raised in the application for review?[157]

(e) Will participation by the tribunal seriously compromise its objectivity or undermine the public's faith in the administration of justice?

(f) Will tribunal involvement unnecessarily lengthen the proceedings or unnecessarily increase costs?[158]

5.188 Secondly, we do not view the limitations which have been placed on tribunal participation in review proceedings as fixed rules of law. The Divisional Court in Ontario has expressed the opinion that

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[157] Professor Mullan, for example, suggests that tribunal involvement, other than nominally, would be inappropriate where matters of partiality or bad faith on the part of the tribunal are alleged: D.J. Mullan, *supra* n. 149. *Cf. Salkeld* v. *Labour Board (Man.)* (1985), 37 Man. R. (2d) 59 at 61 (C.A.).

[158] *Cf. Salkeld* v. *Labour Board (Man.)* (1985), 33 Man. R. (2d) 159 (Q.B.), rev'd in part (1985), 37 Man. R. (2d) 59 (C.A.), recons'd (1986), 39 Man. R. (2d) 287 (C.A.).

> . . . the rule restricting the right of a tribunal to make submissions before the Court is a rule of the Court rather than a rule of law, and the extent of participation to be permitted to the Board must depend on the circumstances of each case.[159]

As well, there are statements in the decisions of the Supreme Court of Canada which suggest that the 'rule' is at least somewhat discretionary.[160] Accordingly, we are of the view that the courts themselves are free to adopt, and indeed may be adopting, a more flexible approach in permitting tribunals to make submissions in review proceedings.

5.189 Finally, even if the restrictions on tribunal participation are regarded as matters of rule rather than practice, there are indications that the rule itself is in a state of evolution. In a recent decision, the Supreme Court of Canada held that a tribunal did have status to appeal from review proceedings in which it was alleged that the tribunal had given a patently unreasonable interpretation to a provision of its governing statute relating to a matter of procedure.[161] This decision is of importance in two respects. It recognizes the tribunal's right of participation where the grounds of attack are that the tribunal exceeded its jurisdiction by making a patently unreasonable error of law.[162] Also, it *may* open the door (oh, so slightly) for tribunals to speak to procedural issues, whether the subject of express statutory provision or the rules of natural justice and procedural fairness.[163]

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[159] *Consolidated-Bathurst Packaging Ltd.* v. *International Woodworkers of America, Local 2-69* (1985), 16 Admin L.R. 37 at 62-63 (Ont. Div. Ct.), per Osler J. (in dissent, but not on this point), rev'd on other grounds (1986), 15 O.A.C. 398 (C.A.). In this case, the tribunal was permitted to make submissions in defence of a long-standing practice which was under attack as being contrary to the rules of natural justice.

[160] *See e.g.*, *Central Broadcasting Co. Ltd.* v. *Canada Labour Relations Board* (1976), 67 D.L.R. (3d) 538 at 544 (S.C.C.) (". . . [I]nasmuch as the jurisdiction of the Board as such has not been challenged, it was our unanimous view that the Board had really no standing before us and counsel appearing for the Board was *not invited* to address the Court." [emphasis added]); *Northwestern Utilities Limited* v. *The City of Edmonton*, *supra* n. 142, at 709 ("It has been *the policy in this Court* to limit the role of an administrative tribunal . . . ." [emphasis added]). *See also* the judgment of Laskin C.J.C. (albeit in dissent on this point) in *Re Canada Labour Relations Board and Transair Ltd.*, *supra* n. 141, at 425; *Isabey* v. *Health Services Commission (Man.)*, *supra* n. 143, at 202 ("*In accord with established practice*, the Committee limited its role . . . ." [emphasis added]).

5.190 We wish to conclude our discussion of this issue by observing that the preservation of the dignity and impartiality of administrative tribunals might best be achieved, not by adopting restrictive rules of law, but rather by heightening the sensitivity of tribunals to the delicate balance which must be maintained by those assuming the dual role of adjudicator/advocate. It may, in the end, be largely a question not of substance, but of style:

> Inferior tribunals cannot be blind to the inherent risk to the appearance of justice that is created when they take an *unduly adversarial stance* in a judicial review application brought by the parties before them. . . . [F]or a [tribunal] to assume an *overly combative posture* in the court poses a danger to the perceived integrity of the public law process. . . . [Tribunals] should strive to retain their voice in the courts, while ensuring that their

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[161] *Bibeault* v. *McCaffrey* (1984), 6 Admin. L.R. 239 (S.C.C.).

[162] *Quaere* if this case can be used to support an argument in favour of permitting tribunals to address questions of *intra-jurisdictional* error of law. Is it reasonable to maintain that a tribunal can make submissions regarding questions of law where its interpretation is challenged as unreasonable, but not where its interpretation is challenged as incorrect? Or is it only in the former case that the tribunal's expertise is regarded as sufficient to render its views useful to the court?

[163] Although *Bibeault* seems to make a distinction between matters of procedure which are provided for by legislation and procedural requirements imposed by the principles of natural justice, *see* the discussion in *Consolidated-Bathurst Packaging Ltd.* v. *International Woodworkers of America, Local 2-69*, *supra* n. 159, at 62 (Div. Ct.), per Osler J. (in dissent, but not on the issue of tribunal participation).

> perspective is voiced sparingly, in measured tones and only in the public interest.[164] [emphasis added]

H. THE ATTORNEY-GENERAL

5.191 The Attorney-General has long been regarded as a special participant in proceedings involving the rights and interests of the public at large. We will here examine three issues pertaining to the role of the Attorney-General with respect to applications for an order upon review under the proposed Act: *locus standi* to institute proceedings; intervention by the Attorney-General where proceedings have been instituted by a private party; and service of notice upon the Attorney-General.

1. *Locus standi*

5.192 Earlier, in Chapter 2 of this Report, we summarized the role of the Attorney-General as guardian of the public interest and his entitlement, as protector of that interest, to institute proceedings where a public body exceeds, or threatens to exceed, its statutory powers. In this Chapter, while examining the issue of standing in relation to private individuals, we suggested that the Attorney-General should not have the *exclusive* right to institute public interest suits in the context of judicial review. However, we are of the view that the entitlement of the Attorney-General to initiate judicial review proceedings should be confirmed under the proposed Act.

5.193 As an elected official, with an electoral mandate, the Attorney-General occupies a unique position from which to represent the public interest (or, more precisely perhaps, an aspect of the public interest) in proceedings involving an alleged abuse of public power. Indeed, the Legislature has imposed upon the Attorney-General the duty of seeing that "the administration of public affairs is in accordance with law."[165] We recommend:

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[164] M.G. Picher, *supra* n. 149, at 41.

[165] *The Attorney-General's Act*, C.C.S.M. c. A170, s. 3(b). Note that this duty with respect to lawful administration may be invoked either to

(Footnote continued to page 168)

RECOMMENDATION 34

That the Attorney-General have standing as of right to institute proceedings for an order upon review.

2. Intervention

5.194 Situations will no doubt arise where the Attorney-General deems it desirable to participate in review proceedings which have been instituted by a private party.[166] He may wish to do so for several reasons: specific interests of the Crown may be affected by the proceedings; important issues of public policy may be raised; the issues of concern to the private parties may not, in his opinion, reflect the interests of the public at large; he may wish to make submissions in situations where the propriety of argument by the respondent tribunal is questionable.

5.195 We are of the view that the Attorney-General should have the right to appear and be heard on an application for an order upon review. Particularly in light of the liberal rules of standing under the proposed Act, participation by the Attorney-General may be desirable to ensure that a broader range of public interest perspectives and important issues of public concern are presented to the Court for its consideration. We recommend:

RECOMMENDATION 35

That the Attorney-General be entitled as of right to be heard on an application for an order upon review.

(Footnote continued from page 167)
institute/support or to oppose an application for judicial review: *Re Energy Probe and Atomic Energy Control Board*, *supra* n. 153, at 721 (T.D.); *cf. Fry* v. *Doucette* (1980), 115 D.L.R. (3d) 274 at 282 (N.S.S.C., App. Div.); *but see* the *obiter* comments in *PPG Industries Canada Ltd.* v. *The Attorney General of Canada*, *supra* n. 56. *See also* E. Campbell, *supra* n. 149, at 300, wherein he observes that the public interest requires not only that administrative agencies observe the legal limits on their powers, but also that they be permitted to use their authority as the Legislature intended.

[166] *See e.g.*, *Re Energy Probe and Atomic Energy Control Board*, *supra* n. 153.

5.196 There are generally two forms which such participation might take: as intervenor, and by appearance as *amicus curiae*. Persons who are permitted by the court to participate fully as intervenors become parties to the proceedings, and are entitled to all the privileges and liabilities that party status entails. They have the right to present evidence, to submit legal argument and to appeal an adverse decision of the court. Intervenors may also have an order of costs awarded against them. In contrast, permission to appear as *amicus curiae* ("friend of the court") does not confer party status. The role is limited to one of presenting argument on matters upon which the court invites assistance.[167] The *amicus curiae*, not being a party to the proceedings, is not bound by the decision, has no right of appeal and is not liable for costs.

5.197 On balance, in circumstances where the Attorney-General chooses to appear, it will usually be most appropriate that the Attorney-General be subject to an order of costs and that he be in a position to appeal an unfavourable decision. Accordingly, we believe that participation by the Attorney-General in proceedings commenced by others should generally be in the capacity of intervenor, that is, as a party. However, we recognize that there will be circumstances in which it is preferable that the Attorney-General participate in a capacity other than that of a full party; we would therefore reserve to the Court the discretion to make such a determination.[168] We recommend:

RECOMMENDATION 36

That, where the Attorney-General participates in an application for an order upon review pursuant to Recommendation 35, he be deemed to be a party to the proceedings, with all the rights, duties and liabilities of a party, unless the Court otherwise orders.

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[167] For a general discussion on the role of *amicus curiae*, *see Re Clark and Attorney-General of Canada* (1977), 81 D.L.R. (3d) 33 (Ont. H.C.).

[168] *Compare* Ont, s. 9(4) and BC, s. 16 (Attorney-General given right to be heard, but status unspecified) *with* Aust, s. 18 (Attorney-General given right to intervene, thereby becoming a party). *Cf. The Constitutional Questions Act*, C.C.S.M. c. C180, s. 7(2), s. 7(6). *See Re Energy Probe and Atomic Energy Control Board*, *supra* n. 153 for considerations which may influence the court to grant the Attorney-General full party status.

3. Notice

5.198 The Judicial Review Procedure Acts of Ontario and British Columbia[169] provide that notice of an application for judicial review must be served on their respective Attorneys-General. We have considered whether a similar provision should be included in the proposed Act, or whether it would be preferable to simply provide for notice to the Attorney-General where, in the opinion of any party or in the opinion of the Court, the application raises an important issue of public concern.[170]

5.199 We see essentially two considerations which speak against a mandatory notice provision in all cases. First, many judicial review applications would be of no interest to the Attorney-General's Department, for example, those involving challenges to disciplinary decisions of professional tribunals such as The Law Society of Manitoba. Secondly, where governmental tribunals are represented by Crown counsel, the Department of the Attorney-General would become aware of the proceedings through the tribunal. In either of these circumstances, compelling notice to the Attorney-General may be seen as imposing an unnecessary burden upon the applicant as well as upon the Attorney-General's staff who would be required to monitor the applications.

5.200 On the other hand, several factors may be invoked in support of a mandatory notice provision. First, the Attorney-General's right to participate in judicial review proceedings (see Recommendation 35) would be best protected by providing for notice in all cases. It should not be for the parties or the Court to divine the interests of the Attorney-General. As well, to rely on the Court to direct service where it is of the opinion that the Attorney-General should be served "would mean delay by reason of adjournment for service or extra applications for directions."[171]

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[169] Ont, s. 9(4); BC, s. 16. *See also* Alta, r. 753.9(1).

[170] *Cf.* Federal Court Rules, r. 1101; Sask, r. 667(2).

[171] Institute of Law Research and Reform (Alberta), *Judicial Review of Administrative Action: Application for Judicial Review* (Report No. 40, 1984) 74.

5.201 Secondly, notice would assist the Attorney-General's Department in keeping informed about the conduct of public authorities and complaints in relation thereto. As well, it would provide an opportunity for the Attorney-General to monitor any deficiencies in provincial enactments which create and empower public authorities.

5.202 Discussions with members of the Attorney-General's Department in British Columbia have revealed strong support for the mandatory notice provision in British Columbia's judicial review legislation. The task of reviewing all in-coming applications has not been seen as onerous in light of the benefits arising from the receipt of notice.

5.203 Having given consideration to the points on both sides of this issue, the Commission is of the view that notice to the Attorney-General should be provided in all proceedings for judicial review. We recommend:

RECOMMENDATION 37

That the Act provide that notice of an application for an order upon review be served on the Attorney-General.

I. RELATIONSHIP BETWEEN APPEALS AND REVIEW

5.204 It is not uncommon for the Legislature to establish a process of appeal from the decisions of an administrative authority. Occasionally, a statute provides for an appeal to a Minister of the Crown or to the Lieutenant Governor in Council. It is more common, however, for a court or a separate agency to be vested with such appellate jurisdiction.[172] Where an appeal process is established, a person aggrieved by an administrative act must decide whether to exercise his right of appeal or, instead, proceed by way of judicial review.

5.205 The existence of a right of appeal does not operate as a bar to judicial review. Rather, it is a factor which the court will consider in determining whether to exercise its discretion to grant or refuse a judicial review remedy. Of key importance is the adequacy and relative convenience of the appeal process in the circumstances of the case.

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[172] For an overview of the present appeal system for administrative decisions in Manitoba, *see* Part I of our *Report on Administrative Law*, *supra* n. 3, at 99 *et seq*. and Appendices D and E thereto.

5.206 Until recently, it was generally the case that the court would exercise its discretion to grant relief on an application for judicial review, notwithstanding the existence of a provision for appeal, where the alleged error constituted a breach of natural justice or was otherwise jurisdictional in nature.[173] This was particularly so if the appeal lay to another administrative body rather than to a court. With respect to intra-jurisdictional errors, absent special circumstances, judicial review was generally refused where there was an effective right of appeal.

5.207 The majority decision of the Supreme Court of Canada in *Harelkin* v. *The University of Regina*,[174] while not actually changing the law, did place a different emphasis on the effect of a right of appeal on the court's discretion to grant relief in judicial review proceedings. The Court highlighted the discretionary nature of the judicial review remedies irrespective of the grounds of review, and suggested that judicial review should generally be refused where there was an adequate alternative remedy, even where the alleged defect involved a denial of natural justice.[175] In evaluating the adequacy of the appeal process, the Court indicated that several factors should be considered, including:

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[173] *See e.g.*, *Re McGavin Toastmaster Ltd. and Powlowski* (1973), 37 D.L.R. (3d) 100 (Man. C.A.); *Bartlett* v. *Manitoba Health Services Commission* (1979), 5 Man. R. (2d) 85 (Q.B.); *Harelkin* v. *The University of Regina*, [1979] 2 S.C.R. 561, per Dickson J. (as he then was) in dissent.

[174] *Id.*

[175] Because the majority adopted the unusual position that breach of the rules of natural justice did not constitute a true jurisdictional error, it is not entirely clear whether a "presumption" in favour of judicial review still exists where the applicant relies on other forms of jurisdictional error. For the suggestion that a clear lack or excess of jurisdiction might still militate in favour of judicial review notwithstanding the existence of an alternative remedy, *see e.g.*, *La Commission des accidents du travail du Québec* v. *Valade*, [1982] 1 S.C.R. 1103 (*Harelkin* not cited); *Re Canadian Logistic Systems and Labour Relations Board* (1984), 6 D.L.R. (4th) 106 (B.C.S.C.).

> . . . the procedure on the appeal, the composition of the [appellate body], its powers and the manner in which they were probably to be exercised by a body which was not a professional court of appeal and was not bound to act exactly as one nor likely to do so. Other relevant factors include the burden of a previous finding, expeditiousness and costs.[176]

The apparent willingness of the majority of the Court to find that the appeal process in *Harelkin* was adequate, despite the shortcomings outlined by the minority, suggests that appeals should normally be exhausted prior to initiating judicial review proceedings, unless the appeal process is clearly less efficacious than judicial review or other exceptional circumstances are established. That is, the court's discretion will generally be exercised to deny relief in judicial review proceedings where provision has been made for an effective right of appeal.

5.208 The guidelines which have been devised at common law respecting the relationship between appeals and review are general in scope and discretionary in application; hence, they do not foster a strong measure of certainty in the law. From this perspective, it would be beneficial to recommend the enactment of an absolute rule which would be framed either to bar a complainant from applying for judicial review in all cases where a statutory appeal is provided for, or to bar resort to an appeal process where judicial review is available with respect to the alleged error. A fixed rule would engender certainty where it is now lacking. Alternatively, it would be possible to grant a complainant complete discretion over which remedy to pursue, thereby obviating the risk of proceedings being dismissed simply because the less appropriate remedy was invoked.[177]

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[176] *Harelkin* v. *The University of Regina*, *supra* n. 173, at 588.

[177] For various statutory attempts to clarify the relationship between judicial review and appeals, *see* PQ, art. 846 (no evocation if appeal available except in cases of want or excess of jurisdiction); Can, s. 29 (review not available "to the extent that [the decision] may be . . .

(Footnote continued to page 174)

5.209 The enactment of a fixed rule would be a feasible solution if all tribunals performed similar functions and if there were uniform provisions pertaining to the scope and function of appeals. However, there is significant variation amongst the types of tribunals and the nature of statutory appeals from their decisions. In some cases, the appeal would provide an adequate, or perhaps even better, alternative to judicial review whereas in others, it would not. Accordingly, we are of the view that a categorical rule respecting the relationship between statutory appeals and judicial review should not be adopted.

5.210 Neither are we in favour of granting the complainant complete discretion as to the choice of remedy. It is our view that where an appeal would provide at least as effective, convenient and appropriate relief as would judicial review, the appellate process should normally[178] be preferred. The general judicial review procedure should not prevail over an effective appeal process which has been specially devised or adopted with respect to the decisions of a particular tribunal.

(Footnote continued from page 173)
appealed"); Ont, s. 2(1), s. 2(5) and NZ, s. 4(1), s. 4(3) (review available "notwithstanding any right of appeal", but court retaining discretion to refuse relief; *see Corporation of the City of Mississauga* v. *The Director appointed in respect of Section 6 of The Environmental Protection Act* (1978), 6 M.P.L.R. 115 (Ont. H.C.)); Aust, s. 10 (review available in addition to, and not in lieu of, other forms of recourse including appeals, but court having discretion to refuse relief on application for review where adequate alternative remedy is available). *See also* LRCC, Recommendation 3.5 (recommending abolition of appeals on questions of law or jurisdiction, because merely duplicate review proceedings); Law Reform Commission of British Columbia, *supra* n. 44, Recommendation 7 (recommending that legislation provide that where statutory right of appeal exists, judicial review is available only in special circumstances).

[178] We say "normally" because special circumstances may arise where judicial review should be permitted, despite the availability of an adequate appeal process; *see e.g.*, *Re Fooks and Alberta Association of Architects* (1982), 139 D.L.R. (3d) 445 (Alta. Q.B.).

5.211 We have concluded, therefore, that the Court should continue to have the discretion to refuse judicial review remedies where an appeal would afford convenient and adequate relief. Factors which the Court might consider in exercising its discretion include the nature of the alleged error; the nature and composition of the appellate body; the nature, scope and purpose of the appeal process and the procedure established therefor; the relative speed and cost of the proceedings; the proceeding by which the controversy is most likely to be brought to a final resolution; and any possible prejudice to the applicant. We believe, however, that these factors are adequately revealed in the case law, and that no need exists to provide an exhaustive list of discretionary factors in the proposed legislation. We recommend:

RECOMMENDATION 38

That the Court have the discretion to refuse to make an order upon review under the Act where it is satisfied that an alternative remedy, such as an appeal, would afford relief that is equally or more convenient, appropriate and effective in the circumstances of the case.

J. INCIDENTAL MATTERS

1. Extension of Time for Application

5.212 Several statutes which confer powers on administrative authorities contain provisions which purport to prohibit the institution of review proceedings after a particular period of time has elapsed.[179] However, such time limits have generally been ineffective in barring review proceedings instituted after their expiration. First, such provisions are construed strictly, and may be held inapplicable to forms of review other than those specifically referred to in the statute.[180] More significantly, it appears that, in Canada, the expiration of a statutory time limit will not prevent review on the ground of jurisdictional error, the rationale being that an

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[179] *See e.g.*, *The Municipal Act*, C.C.S.M. c. M225, s. 190(1); *The Labour Relations Act*, C.C.S.M. c. L10, s. 121.3(2), s. 121.3(6).

[180] *See e.g.*, *Wiswell v. Metropolitan Corporation of Greater Winnipeg* (1965), 51 D.L.R. (2d) 754 (S.C.C.).

ultra vires act cannot be made valid by the passage of time: a nullity is a nullity.[181] Similarly, if a statutory time limit is viewed as a time-delayed privative clause, it is arguably limited in its effect on the basis that it is beyond the competence of the provincial Legislature to restrict the powers of a superior court to review for jurisdictional error.[182]

5.213 To the extent that any statutory time limits may be held applicable to applications for an order upon review under the proposed Act, we think that the Court should be empowered to extend the time for bringing an application. Such discretion should be exercised only where the Court is satisfied that no substantial prejudice or hardship would result to any person affected by reason of the delay.[183] We make this recommendation for the same reason that we recommended against the adoption of a general limitation period under the Act (see Recommendation 24): it is our view that a discretionary approach strikes the fairest balance between the interests of finality and certainty, and the interests of fairness and legality, in the administrative process. We recommend:

> *RECOMMENDATION 39*
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> *That the Act provide that, where any time limitation is fixed by or under any Act for the bringing of an application for an order upon review, the Court has the discretion to extend the time for bringing the application where it is satisfied that no substantial prejudice or hardship would result to any person affected by reason of the delay.*

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[181] *Beacon Hill Lodges of Canada Ltd.* v. *Metropolitan Corporation of Greater Winnipeg* (1978), 89 D.L.R. (3d) 239 (Man. C.A.); *Re Mid-West By-Products Co. and Clean Environment Commission, supra* n. 18.

[182] *But see* H.W.R. Wade, *supra* n. 4, at 612-614, wherein he argues that a time limit clause should be viewed as analogous to a statute of limitations, rather than as a form of privative clause *per se*. *Cf*. L.H. Leigh, "Time Limit Clauses and Jurisdictional Error", [1980] Pub. L. 34.

[183] *See* Ont, s. 5; BC, s. 11.

2. Court Not Limited by Content of Application

5.214 Earlier in this Chapter, we recommended that the Act specify that the contents of an application for an order upon review include notice of the grounds of review, the nature of the relief sought and the affidavits or other evidence to be used in support of the application (see Recommendation 27). Such a provision would ensure that the respondents to the application would receive full particulars in advance of the proceedings. We do not think, however, that the Court should be confined to order only the relief which is claimed in the application. Instead, it should be empowered to grant a form of relief (other than damages) in addition to, or in substitution for, the relief requested by the applicant.[184] This would be in keeping with our objective of ensuring that an applicant is not refused a remedy merely because he asked for an unsuitable form of relief. The Court should also be empowered to allow the applicant to raise grounds in addition to those cited in his application for an order upon review, upon such terms regarding amendments, adjournments, etc., as it considers proper. Such a provision would further facilitate the full adjudication of the case on its merits. We recommend:

RECOMMENDATION 40

That the Court be empowered under the Act to:

(a) *allow an applicant to raise grounds in addition to those set forth in the application for an order upon review, on such terms, if any, as the Court considers proper; and*

(b) *make an order upon review that is in substitution for or in addition to the relief sought by the applicant in the application for an order upon review.*

3. Technical Defects

5.215 Under the common law, the court may exercise its discretion to refuse relief in circumstances where a defect is trivial in nature,[185] although there is some doubt as to its power to do so where the error relates to a mandatory statutory provision. The judicial review legislation in both Ontario and British Columbia[186] provides that, where the sole ground for relief established is a defect in form or a technical irregularity, resulting in no substantial wrong or miscarriage of justice, the court may refuse relief and make an order validating the challenged decision. The benefits of such a provision are essentially two-fold. First, it serves to confirm the court's discretion to refuse relief where a minor defect results in no substantial wrong. This helps to alleviate the risk of undue formalism in the administrative process.[187] In addition, it empowers the court to validate an impugned decision and thus overcome any objection that, in spite of the court's refusal to grant relief, the decision is nevertheless void. We recommend that a similar provision be incorporated into our Act. Our recommendation is as follows:

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[184] *Cf.* Barb, s. 5(3). *Compare with* Eng Rules, r. 6(1) and 6(2); NB, r. 69.09.

> *RECOMMENDATION 41*
>
> *That where the sole ground for relief established is a defect in form or a technical irregularity, the Act empower the Court to refuse relief, where it finds that no substantial wrong or miscarriage of justice has occurred, and, where a decision has already been made, to make an order validating the tribunal's decision.*

4. Quo Warranto

5.216 In Chapter 2 of this Report, we provided a brief overview of the law relating to quo warranto. We now turn to consider whether relief in the nature of quo warranto should be incorporated within our proposed Act and, if so, the nature and scope of that relief. Two factors speak against the inclusion of this remedy in our proposed Act. First, quo warranto is a remedy of narrow application which is rarely sought in Manitoba, it being largely supplanted by specific statutory provisions.[188] Accordingly, it could be argued that there is no need for its inclusion in the proposed Act because of the incidence of its use. The second argument against its inclusion involves an assessment of the scope of the remedy. Quo warranto is not aimed at redressing administrative decisions which are made in excess of jurisdiction or upon incorrect legal principles, as are the other remedies available under the proposed Act. Therefore, it could be argued that the inclusion of the remedy would not 'fit into' the scheme of the proposed Act.

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[185] *See e.g.*, *Tweed* v. *Assiniboine South School Division No. 3* (1982), 18 Man. R. (2d) 403 (C.A.).

[186] Ont, s. 3; BC, s. 9.

[187] The need to guard against undue formalism was expanded upon in Part I of our *Report on Administrative Law*, *supra* n. 3. *See e.g.*, §4.04 of that Report.

5.217 In spite of these arguments, we have concluded that the remedy of quo warranto should be incorporated into our proposed Act. In particular, we think that orders similar in nature to a declaration and injunction should be made available under the Act in circumstances where quo warranto is currently available. Our decision is based upon several considerations. First, quo warranto is a public law remedy and the proper appointment of public officials is a matter of public concern. These features it shares with the other forms of relief available under the Act. Secondly, to the extent that the remedy is used, its replacement with relief in the nature of declaratory and injunctive orders would simplify and modernize the law. Finally, the inclusion of quo-warranto-type relief would allow it to be claimed in conjunction with the other forms of relief in circumstances where it is uncertain as to which administrative law remedy is most appropriate. We note that in England, British Columbia and Barbados[189] such relief is made available in judicial review proceedings.

5.218 Because the basis upon which relief in the nature of quo warranto is granted differs significantly from the bases upon which other judicial review remedies are available, we think it should be treated separately from other forms of relief under our Act. The remedy of quo warranto should be abolished and the statutory provisions relating thereto should be repealed. In its place, relief in the nature of "an order declaring" and "an order prohibiting" would be made available. The common law substantive rules respecting the availability of quo warranto should govern the availability of the new form of relief. Our basic recommendations regarding the remedy of quo warranto are as follows:

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[188] *See e.g.*, *The Municipal Act*, C.C.S.M. c. M225, s. 66; *The Local Authorities Election Act*, C.C.S.M. c. L180, s. 151.

[189] Eng Act, s. 31 (1)(c), Eng Rules, r. 1(1)(b); BC, s. 19; Barb, s. 10. *See also* Alta, r. 753.4(1); NB, r. 69.01, r. 69.13(5); Sask, r. 664(1).

RECOMMENDATION 42

That the remedy of quo warranto be abolished, and sections 96 to 98 of The Queen's Bench Act, which pertain to quo warranto, be repealed.

RECOMMENDATION 43

That the Act provide that where the remedy of quo warranto would have otherwise been available, the Court is empowered to grant relief in the nature of an order prohibiting the person from acting in the office and an order declaring the office to be vacant.

5.219 Subsection 96(2) of *The Queen's Bench Act* requires that an applicant give security prior to serving a notice of motion for quo warranto. The ostensible justification for this requirement is to shield public officers from harassment and prevent abuse of the Court process by disappointed candidates. A deposit of security is not required where an applicant seeks other forms of relief under our proposed Act. We are of the view that it is unnecessary to adopt such a requirement in relation to an application for quo-warranto-type relief under the proposed Act. We recommend:

RECOMMENDATION 44

That the present requirement to post security for the commencement of quo warranto proceedings not be continued in the Act.

5.220 Section 98 of *The Queen's Bench Act* at present bars proceedings for quo warranto where specific provision is made in another enactment respecting challenges to an official's entitlement to act in a public office. We are of the view that, where special provision is made in another enactment, proceedings under the proposed Act should likewise be barred. We recommend:

RECOMMENDATION 45

That the Act not apply where special provision is made in another statute for challenges to the entitlement of an official to act in a public office.

5. *Habeas Corpus*

5.221 We do not recommend that the remedy of ***habeas corpus*** be included in our proposed Act. This conclusion is based in part upon the fact that this remedy may issue against any person and not just those exercising public functions. It is also used mainly in criminal proceedings which we recommended earlier be outside the ambit of the Act (see Recommendation 6). A further factor influencing our decision not to include this remedy is the special position that ***habeas corpus*** has traditionally enjoyed in the protection of civil liberties. Indeed, the right to question the validity of an arrest or detention by way of ***habeas corpus*** has been given constitutional status, with the passage of the *Canadian Charter of Rights and Freedoms*.[190] We recommend:

> ***RECOMMENDATION 46***
>
> ***That the scope of the Act not extend to proceedings respecting an application for a writ of habeas corpus or an order of certiorari in aid thereof.***

K. DOMESTIC TRIBUNALS

5.222 There remains one difficult issue to resolve respecting the scope of our proposed judicial review legislation. Should such legislation encompass the judicial control exercised over the decisions of domestic tribunals? We have deferred this question, as our primary concern has been the development of judicial review legislation with respect to administrative authorities. If, however, the procedures therein established are suitable, and the substantive principles generally applicable, to the 'review' of the decisions of domestic tribunals, it may be desirable to expand our proposals to accommodate such bodies as well.

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[190] *Canadian Charter of Rights and Freedoms*, s. 10(c).

1. What Is a Domestic Tribunal?

5.223 Domestic tribunals include such persons or bodies as consensual arbitrators, some internal committees of universities, and governing bodies of trade unions, business associations and sporting or social clubs. Insofar as these bodies make determinations affecting the rights, privileges or interests of persons over whom they exercise authority, they resemble certain public administrative authorities. However, they may be distinguished from administrative authorities in that they are not organs of the government and their authority to make decisions is not conferred by statute.[191]

5.224 The central feature of domestic tribunals is that the source of their authority is consensual or contractual. As such, they are also referred to as "consensual tribunals" or "non-statutory tribunals". With respect to consensual arbitrations, the contracting parties agree to bestow certain decision-making powers upon the arbitrator or arbitration board. In the case of associations or clubs, the member, in joining the club, agrees to be bound by decisions of the association's governing body in accordance with the organization's constitution or the membership contract. A second common feature of domestic tribunals is that generally the prerogative remedies do not lie against them. Rather, their decisions may be challenged in an action for an injunction, declaration or damages, or, in the case of consensual arbitrators, by a common law motion to quash.

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[191] A governmental body, constituted and empowered by action of the executive rather than by statute, is an administrative, not a domestic, tribunal (*R. v. Criminal Injuries Compensation Board*, *supra* n. 4). Conversely, a non-governmental body which exercises statutory powers (e.g., the discipline committee of The Law Society of Manitoba) is also an administrative, not a domestic, tribunal. A domestic tribunal is *both* non-governmental and non-statutory.

Comment must be made respecting The Law Society of Manitoba and other statutory bodies which regulate the conduct of members of their respective professions. They are sometimes referred to, particularly in England, as "domestic tribunals" because of their non-governmental nature (*see* H.W.R. Wade, *supra* n. 4, at 566; *Posluns* v. *Toronto Stock Exchange* (1964), 46 D.L.R. (2d) 210 at 290 (Ont. H.C.), aff'd (1965), 53 D.L.R. (2d) 193 (Ont. C.A.), aff'd (1968), 67 D.L.R. (2d) 165 (S.C.C.)). We do not, in this Report, adopt such usage of the term. In Canada, disciplinary committees of professional associations acting pursuant to statutory authority are, for the purposes of judicial review, treated on the same general footing as are governmental administrative authorities. That is, the prerogative remedies of certiorari, prohibition and mandamus will lie against them. Their decisions may be challenged on the same basis as those of other statutory bodies: breach of the rules of natural justice, lack or excess of jurisdiction and error of law on the face of the record (*see e.g.*, *Re Emerson and Law Society of Upper Canada* (1983), 5 D.L.R. (4th) 294 at 310 (Ont. H.C.)). Accordingly, our general discussion and recommendations in this Report respecting administrative tribunals already encompass the governing bodies of statutory professional associations.

2. Consensual Arbitrators

5.225 Arbitrators or arbitration boards may be classified either as statutory or consensual. Until recently, it was held by the courts that an arbitrator was statutory only where arbitration was compelled by statute.[192] Thus, where collective agreements were required by statute to provide for final settlement "by arbitration or otherwise", arbitrators were held to be consensual because resort to arbitration was not compelled by law. This distinction has been the subject of criticism, as "the tasks being performed by arbitrators under labour statutes are virtually indistinguishable, and their public law aspect not affected one iota by whether or not the relevant statute says 'or otherwise'."[193]

5.226 The law has been altered by a recent Supreme Court of Canada decision,[194] wherein it was held that a statutory arbitrator is one to which parties are required by statute to resort or one which has duties conferred on it by statute. This narrows the category of consensual arbitrators, but nevertheless may still leave the dividing line between consensual and statutory arbitration somewhat blurred in certain cases.

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[192] *Howe Sound Company* v. *International Union of Mine, Mill and Smelter Workers (Canada), Local 663*, [1962] S.C.R. 318; *R.* v. *Petursson*, *supra* n. 141.

[193] D.J. Mullan, "Developments in Administrative Law: The 1982-83 Term" (1984), 6 Supreme Court L.R. 1 at 16.

[194] *Roberval Express Ltd.* v. *Transport Drivers, Warehousemen & General Workers Union, Local 106* (1982), 144 D.L.R. (3d) 673 (S.C.C.).

5.227 While a distinction between consensual and statutory arbitrators remains, there now appears to be no functional difference between them in relation to judicial review. The decisions of statutory arbitrators may be challenged by certiorari, those of consensual arbitrators by a common law motion to quash. However, the Supreme Court has recognized this as a distinction of no substance, and has refused to pay "homage to technicality":[195]

> . . . [R]elief by way of *certiorari* is obtained in an originating motion and no writ is issued. This is the same procedure that is used to quash an award of a private arbitrator or arbitration tribunal. The notice of motion in these proceedings makes it clear that the relief asked for is an order quashing the award. It does not seem to me to be of any consequence that the motion contains a reference to *certiorari*. The procedure is the same . . . .[196]

Thus, where it is desired to quash an arbitration award, it matters little in fact, from a procedural point of view, whether the arbitration board is consensual or statutory.

5.228 We note with interest that the courts in Ontario have extended the scope of the Ontario judicial review legislation to cover the decisions of consensual arbitrators, even though the Ontario Act is clearly limited to bodies amenable to the prerogative writs or exercising statutory powers. In at least two decisions,[197] the review of the decisions of consensual arbitrators was held to come under the Act on the questionable basis that the common law quashing of a consensual arbitrator's award is "an order in the nature of certiorari" within the meaning of the judicial review legislation.

5.229 As well, there now appears to be little or no distinction in the scope of judicial review of arbitrators' awards, whether consensual or statutory. The available grounds of review are:

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[195] *Association of Radio and Television Employees of Canada (CUPE-CLC)* v. *Canadian Broadcasting Corporation*, [1975] 1 S.C.R. 118 at 137. *See also R.* v. *Petursson*, *supra* n. 141.

[196] *Port Arthur Shipbuilding Co.* v. *Arthurs* (1968), 70 D.L.R. (2d) 693 at 702 (S.C.C.).

[197] *Re Ontario Provincial Police Association Inc. and The Queen in Right of the Province of Ontario* (1974), 46 D.L.R. (3d) 518 (Ont. Div. Ct.); *Re Major Holdings & Developments Ltd. and Incorporated Synod of the Diocese of Huron* (1979), 94 D.L.R. (3d) 474 (Ont. Div. Ct.).

a) breach of the rules of natural justice or procedural fairness;

b) lack or excess of jurisdiction;

c) intra-jurisdictional error of law where the test is: "was the arbitrator's interpretation of the contract or collective agreement one that the language of the agreement could reasonably bear?" or, stated in the reverse, "was the interpretation patently unreasonable?"[198] That is, the error of law must assume jurisdictional proportion;

d) fraud.[199]

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[198] *See Douglas Aircraft Co. of Canada Ltd.* v. *McConnell*, [1980] 1 S.C.R. 245 for statutory tribunals. *See Volvo Canada Ltd.* v. *International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, Local 720* (1979), 99 D.L.R. (3d) 193 (S.C.C.); *Shalansky* v. *Board of Governors of Regina Pasqua Hospital* (1983), 145 D.L.R. (3d) 413 (S.C.C.); *Re Suncor Inc. and McMurray Independent Oil Workers Local #1* (1982), 142 D.L.R. (3d) 305 (Alta. C.A.); *Brandon Division Association No. 40 of the Manitoba Teachers' Society* v. *Brandon School Division No. 40* (1983), 23 Man. R. (2d) 178 (Q.B.), aff'd 24 Man. R. (2d) 213 (C.A.); *Flyer Industries Limited* v. *Canadian Association of Industrial, Mechanical and Allied Workers, Local 3* (1986), 38 Man. R. (2d) 148 (C.A.) for consensual tribunals; *but cf. Re Miami Fashions (1979) Ltd. and Amalgamated Clothing & Textile Workers Union, Local 459* (1984), 8 D.L.R. (4th) 353 (Man. C.A.). For an analysis of the recent Supreme Court cases, *see* B. Langille, "Developments in Labour Law: The 1931-82 Term" (1983), 5 Supreme Court L.R. 225 at 246; R.M. Brown, "Developments in Labour Law: The 1982-83 Term" (1984), 6 Supreme Court L.R. 237 at 271. It would appear that the rule that specific questions of law referred to a consensual arbitrator are *not* reviewable by a court may be on the verge of extinction; *contra Re Miami Fashions, above*.

Note that where the alleged error involves not the interpretation of the contract, but rather the interpretation of a statutory provision or the application of the common law, the standard of review is "correctness", not "reasonableness": *McLeod* v. *Egan* (1974), 46 D.L.R. (3d) 150 (S.C.C.), per Laskin C.J.C.; *Douglas Aircraft, above*, per Estey J. (dissenting in part); *Re Bilson and University of Saskatchewan* (1984), 16 D.L.R. (4th) 31 (Sask. C.A.).

[199] The grounds of statutory review in s. 113.3(2) of *The Labour Relations Act*, C.C.S.M. c. L10, correspond in substance with these common law grounds. Although the subsection contains no specific reference to patently unreasonable interpretations, such errors would constitute an excess of jurisdiction: *Freshwater Fish Marketing Corporation* v. *Retail Wholesale and Department Store Union, Local Number 561* (1982), 19 Man. R. (2d) 110 (C.A.). *The Arbitration Act*, C.C.S.M. c. A120, s. 22(2), also provides for a statutory application to set aside the award of an arbitrator governed by the Act, on the basis of misconduct by the arbitrator or improper procurement of the award. These grounds have been interpreted broadly to correspond to the grounds available at common law: J.A. Keefe, "Judicial Review of Arbitration Awards" (1985), 4 Advocates' Soc. J. 15.

5.230 In summary, we have been influenced by the following considerations:

a) Judicial review of the awards of statutory arbitrators will be available under our proposed legislation in appropriate circumstances.

b) In the present state of the law, it is difficult at times to predict with any certainty whether a particular arbitration board will be categorized as statutory or consensual.

c) The common law motion to quash decisions of consensual arbitration tribunals differs only in name from certiorari to quash decisions of statutory arbitration tribunals. Both involve the exercise by the court of its supervisory jurisdiction.[200]

d) Consensual arbitrators' decisions are reviewable under Ontario's *Judicial Review Procedure Act*.

e) Recent case law suggests that the scope of judicial review in relation to the decisions of both consensual and statutory arbitrators is substantially the same.

5.231 We are of the view that procedurally and, in general, substantively, our proposed judicial review legislation is well-suited to the review of awards of consensual arbitrators. As well, the inclusion of these awards may avoid needless litigation respecting technical matters of procedure. Our general discretionary formula respecting the scope of our proposed legislation may be sufficiently broad to include decisions made by consensual arbitrators. For the sake of clarity, however, we recommend that the Act expressly be made applicable to the review of decisions made by consensual arbitrators and arbitration boards. We recommend:

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[200] Although the phrase "supervisory jurisdiction" is normally used to describe a superior court's inherent power to review a decision of an administrative tribunal, it can also be used to include the court's review of consensual arbitrators' awards. *See e.g.*, the decision of Laskin C.J.C. (in dissent but not on this point) in *Metropolitan Toronto Police Association* v. *Metropolitan Toronto Board of Commissioners of Police* (1974), 45 D.L.R. (3d) 548 at 552 (S.C.C.) wherein he states:

> The main question in this case is the scope of review (to be distinguished from appeal) open to a Court whose *supervisory authority* is invoked against an award of a consensual arbitrator to whom a question of construction has been referred. [emphasis added]

It should be noted, however, that the court may refuse to exercise its supervisory jurisdiction where other adequate remedies exist. *See Manitoba Telephone System* v. *Greater Winnipeg Cablevision Ltd.* (1984), 6 Admin. L.R. 197 (Man. C.A.).

RECOMMENDATION 47

That the Act expressly include within its scope the review of decisions made by consensual arbitrators and consensual arbitration boards.

5.232 We wish to add that, by so recommending, we are not advocating or promoting greater interference by the courts in matters which parties have chosen to submit to arbitration. It is simply our view that, where judicial review of an arbitrator's award is appropriate, the proceedings should fall under our proposed legislative scheme.

3. University Committees

5.233 "Universities when examined closely from the point of view of their juridical position and the legal nature of their activities, are very curious bodies."[201] If one focuses upon the university as a self-governing legal corporation, which enters into contracts with members of its staff and students, it would seem that disputes which arise from these relationships are private matters which should be resolved purely in accordance with the law of contract. Alternatively, however, the university may be viewed primarily as a public body, performing the public functions of educating citizens and promoting higher learning. As such, its decisions respecting the appointment and tenure of professors, the conferral of degrees upon students and other such 'internal' matters which lie at the very heart of its existence, acquire public significance and should perhaps be subject to the controls of administrative law.

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[201] G.H.L. Fridman, "Judicial Intervention Into University Affairs" (1973), 21 Chitty's L.J. 181.

5.234 In general, it may be said that courts are reluctant to intervene in university affairs.[202] Nevertheless, where university committees are dealing with such matters as student appeals or disputes over tenure, courts have intervened on the basis of breach of the rules of natural justice or manifest unfairness,[203] and on the ground of 'no evidence'.[204]

5.235 Whether a particular university committee will be viewed as statutory or domestic is often difficult to predict, and depends largely on how directly the committee is constituted under, or derives its powers from, a legislative source, and whether these powers can be characterized as "public" in nature. Indeed, many university tribunals might well be captioned "hybrid bodies" because they seem to "straddle the line between purely domestic tribunals and public administrative bodies".[205]

5.236 Several important consequences flow from the categorization of a university body as statutory as opposed to domestic. First, it affects the degree of control which courts will exercise over the body,[206] the courts being more reluctant to intervene where the body is non-statutory. Secondly, where the committee is statutory, any requirement to observe the principles of natural justice will rest on the interpretation of its empowering legislation. Where the committee is domestic, any duty respecting natural justice will be contractual in origin.[207] Finally, the prerogative remedies will lie against a statutory tribunal.[208] Decisions of domestic tribunals must be challenged in an action for a declaration, injunction or damages, and prerogative relief is not available.[209]

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[202] *See e.g., Paine* v. *University of Toronto* (1981), 34 O.R. (2d) 770 (C.A.).

[203] *See e.g., Re Polten and Governing Council of the University of Toronto* (1975), 59 D.L.R. (3d) 197 (Ont. Div. Ct.); *Kane* v. *Board of Governors of the University of British Columbia*, [1980] 1 S.C.R. 1105; *Re Bennett and Wilfred Laurier University* (1983), 43 O.R. (2d) 123 (Div. Ct.), aff'd (1984), 48 O.R. (2d) 122 (C.A.); *Re Giroux and The Queen in right of Ontario* (1983), 43 O.R. (2d) 552 (Div. Ct.), aff'd (1984), 46 O.R. (2d) 276 (C.A.); *Thomas* v. *Mount Saint Vincent University* (1986), 19 Admin. L.R. 145 (N.S.S.C., T.D.). *Cf. Re Vanek and Governors of The University of Alberta* (1975), 57 D.L.R. (3d) 595 (Alta. S.C., App. Div.). *See also* R.L. Campbell, "Administrative Law - Colleges and Universities - Denial of Tenure - Judicial Review" (1983), 61 Can. Bar Rev. 622.

[204] *Re McInnes and Simon Fraser University* (1982), 140 D.L.R. (3d) 694 (B.C.S.C.), aff'd (1984), 3 D.L.R. (4th) 708 (B.C.C.A.).

[205] J.R.S. Forbes, *The Law of Domestic or Private Tribunals* (1982) 50.

5.237 The decisions of those university committees and bodies which are viewed as statutory may be reviewable in accordance with the general provisions respecting the scope of our proposed judicial review legislation. Our discussion below, in which judicial control over domestic tribunals in general will be canvassed, will be of relevance to the domestic tribunals of universities.

4. Other Domestic Tribunals - Trade Unions, Business Associations and Clubs

5.238 A governing body or disciplinary committee of a trade union, business association, or sporting or social club will generally be regarded as a domestic tribunal. The authority of such a body or committee to expel, suspend or otherwise discipline a member is usually based upon the governing rules of the association (which may be in the form of by-laws, a constitution or charter, etc.). A member subscribes to such rules and agrees to be bound thereby upon joining the association. Accordingly, the jurisdiction exercised by a domestic tribunal over a member is consensual or contractual in origin.[210]

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[206] *Re Polten and Governing Council of the University of Toronto*, *supra* n. 203.

[207] *Elliot* v. *Governors of University of Alberta*, [1973] 4 W.W.R. 195 (Alta. S.C.); *Re Polten and Governing Council of the University of Toronto*, *supra* n. 203; H.W.R. Wade, "Judicial Control of Universities" (1969), 85 Law Q. Rev. 468.

[208] *See e.g.*, *King* v. *University of Saskatchewan* (1969), 6 D.L.R. (3d) 120 (S.C.C.); *Elliot* v. *Governors of University of Alberta*, *ibid.*; *Re Polten and Governing Council of the University of Toronto*, *supra* n. 203; *Paine* v. *University of Toronto*, *supra* n. 202

[209] *Elliot* v. *Governors of University of Alberta*, *supra* n. 207; *Re Thomas and Committee of College Presidents*, [1973] 3 O.R. 404 (Div. Ct.).

5.239 The decision of a domestic tribunal may be challenged in an action for a declaration, injunction or damages. Such an action is normally framed in contract,[211] although in some circumstances an action for breach of trust, tort or restraint of trade may be instituted.[212] It is important to note, however, that some civil cause of action must be established; the court exercises no inherent supervisory jurisdiction over the decisions of domestic tribunals.[213]

5.240 In some circumstances, it may not be clear whether the governing body of an association is exercising statutory powers or exercising powers conferred by contract. There is some authority to suggest that where an association is incorporated under special statute and is given authority thereunder to pass regulations to govern its affairs, disciplinary decisions made in accordance with such regulations involve the exercise of statutory powers which are reviewable by way of the prerogative remedies.[214] However, the better view would appear to be that the powers so exercised are statutory (in the administrative law sense), and prerogative relief available, only where the legislature may be said to have delegated to the association the right to regulate and discipline its members in the public interest. That is, the duty to decide must be imposed by law in the interest of the community and be in the nature of a public jurisdiction.[215] Otherwise, the governing bodies of incorporated associations are exercising contractual, not statutory, powers, and fall within the category of domestic tribunals.

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[210] *Lee* v. *Showmen's Guild of Great Britain*, [1952] 1 All E.R. 1175 (C.A.).

[211] *Nagle* v. *Feilden*, [1966] 2 Q.B. 633 (C.A.); *Philipzuk* v. *Edmonton Real Estate Board Co-operative Listing Bureau Limited*, [1975] 4 W.W.R. 449 (Alta. S.C., App. Div.); *Senez* v. *Montreal Real Estate Board*, [1980] 2 S.C.R. 555; *Parker* v. *Lethbridge Real Estate Board Co-op Limited* (1983), 49 A.R. 279 (Q.B.), aff'd (1986), 70 A.R. 61 (C.A.).

[212] J.R.S. Forbes, *supra* n. 205. Note that, historically, the court's jurisdiction to prevent improper expulsion from a voluntary association was based on deprivation of property rights vested in the member: *see e.g.*, *Rigby* v. *Connol* (1880), 14 Ch. Div. 482; *Zawidoski* v. *Ruthenian Greek Catholic Parish of St. Vladimir & Olga*, [1937] 2 D.L.R. 509 (Man. Q.B.).

[213] *But cf. Re Rees and United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States and Canada, Local 527*, *infra* n. 217.

5.241 Special mention must be made of executive boards of trade unions exercising disciplinary functions, which are traditionally regarded as domestic tribunals.[216] The Ontario Divisional Court has recently held that a union disciplinary body is akin to a public administrative tribunal and is, accordingly, amenable to certiorari.[217] The Court acknowledged that, in the past, certiorari had never issued against such a domestic tribunal and that the board was clearly not exercising statutory powers. However, Henry, J. emphasized that "[t]he role of trade unions in our society is now so firmly entrenched as a matter of public and legislative policy that . . . the relations between a union and its members . . . is a matter of public not private concern."[218] The learned judge likened the disciplining of members by the union's tribunal to similar activities undertaken by statutory disciplinary tribunals of professional associations. The learned judge further stated that a body which has the power, whether statutory or consensual, to affect the rights and liabilities of members and which is under a duty to adhere to the requirements of natural justice, is amenable to the jurisdiction of the Court by way of judicial review. This purely functional approach focuses exclusively on the nature of the tribunal's activity and not also on the source of its authority, and suggests that the court's supervisory jurisdiction may be extended to the decisions of domestic tribunals. In the words of Henry, J., "the rigidity of the distinction between statutory and non-statutory tribunals is diminishing."[219]

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[214] *R.* v. *Halifax-Dartmouth Real Estate Board* (1964), 44 D.L.R. (2d) 248 (N.S.S.C.).

[215] *Re Hess and Incorporated Canadian Racing Ass'ns*, [1946] 3 D.L.R. 91 (Ont. C.A.); *Senez* v. *Montreal Real Estate Board*, *supra* n. 211; *Pestell* v. *Kitchener-Waterloo Real Estate Board Inc.* (1981), 34 O.R. (2d) 476 (Div. Ct.); *Peg-Win Real Estate Ltd.* v. *The Winnipeg Real Estate Board* (1985), 19 D.L.R. (4th) 438 (Man. Q.B.), aff'd 27 D.L.R. (4th) 767 (Man. C.A.).

[216] *See e.g.*, *Evaskow* v. *International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers* (1969), 68 W.W.R. 415 (Man. Q.B.), aff'd 71 W.W.R. 565 (Man. C.A.).

[217] *Re Rees and United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States and Canada, Local* 527 (1983), 150 D.L.R. (3d) 493 (Ont. Div. Ct.).

5.242 The 'grounds' upon which a court may find that a domestic disciplinary tribunal has breached the contract of membership include:[220]

a) lack or excess of authority, including acting on the basis of no evidence;

b) breach of the rules of natural justice. The requirement to adhere to these rules is an implied contractual term. Any provision in the association's rules purporting to exclude the rules of natural justice may be invalid as contrary to public policy.[221] The precise content of the rules will, however, depend upon the particular circumstances of the case.[222] Where the consequences of the tribunal's decision are serious (e.g. loss of livelihood by expulsion from a trade union), the rules of natural justice will impose high standards of fair procedure;

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[218] *Id.*, at 501.

[219] *Id.*, at 500. *See also Lindenburger* v. *United Church of Canada* (1985), 10 O.A.C. 191 (Div. Ct.) and *Re Porter and Royal Canadian Legion* (1986), 28 D.L.R. (4th) 97 (N.S.S.C., T.D.), which also suggest that the decisions of a private organization may be subject to the court's supervisory jurisdiction where the organization has a sufficiently public character. Both cases emphasized, however, that such jurisdiction should be sparingly exercised.

[220] *Lee* v. *Showmen's Guild of Great Britain*, *supra* n. 210; *Posluns* v. *Toronto Stock Exchange*, *supra* n. 191; R.E. Forbes, "Judicial Review of the Private Decision Maker: The Domestic Tribunal" (1976), 15 U.W.O.L. Rev. 123.

c) bad faith, malice or bias;

d) error of law in the interpretation of the governing rules.

5.243 In general, it appears that trade unions and business associations are subject to closer scrutiny by the courts than are social clubs, because of the more serious consequences which may flow from their decisions. Also their 'monopolistic control' over various trades and business endeavours invests them with a greater element of public, as opposed to purely private, interest.

5.244 The following factors speak in favour of including domestic tribunals within the scope of our proposed Act:

a) In some cases, it is difficult to ascertain whether a particular tribunal is administrative or domestic. This problem arises especially in relation to university committees and disciplinary committees of trade unions and incorporated business associations. Where the character of the tribunal is uncertain, litigants will be faced with the dilemma of choosing the correct procedure for challenging the impugned decisions, unless both administrative and domestic tribunals are subject to review in the same proceedings.

b) The powers exercised by domestic tribunals are similar in nature to those exercised by some statutory tribunals. That is, there is little functional difference between the two types of bodies.

c) The bases upon which courts will examine the decisions of domestic tribunals correspond to the grounds upon which the decisions of administrative tribunals are reviewable under our proposed legislation. The only difference appears to be that courts are generally more exacting when reviewing the decisions of administrative authorities.

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[221] *Lee* v. *Showmen's Guild of Great Britain*, *supra* n. 210.

[222] *Chisholm* v. *Jamieson* (1974), 47 D.L.R. (3d) 754 (B.C.S.C.).

d) Relief in the nature of an injunction or declaration may be awarded in an order upon review under the proposed Act. Damages are also available. These forms of relief are those at present available against domestic tribunals.

e) The inclusion of domestic tribunals under the judicial review legislation would merely provide a procedural option. An action could still be commenced by statement of claim where deemed more appropriate.

5.245 On the other hand, consideration must be given to the following:

a) The foundations of the court's jurisdiction to 'review' the decisions of domestic tribunals and its jurisdiction to review the decisions of administrative tribunals are radically different. The first requires the establishment of a civil cause of action (usually in contract); the second arises from the court's inherent power to ensure that public authority is exercised according to law. Only the latter falls within the purview of administrative law. It must be noted, however, that several recent cases have suggested that the foundation of the court's jurisdiction to intervene in the affairs of at least some domestic tribunals may be shifting from power to protect contractual rights to inherent supervisory power.

b) It may be argued that it is inappropriate to deal with private bodies under a statute designed primarily for the public law field.

c) One of the major defects which our proposals were designed to remedy involved the confusing and overlapping boundaries between the prerogative orders and the declaration and injunction. No such confusion surrounds domestic bodies; the availability of the declaration, injunction and damages are clearly defined.

5.246 On balance, the Commission finds the arguments in favour of including domestic tribunals under our proposed legislation more persuasive. Accordingly, we recommend:

RECOMMENDATION 48

That the Court be empowered under the Act to review the decisions of a person or body functioning as a domestic tribunal, where grounds for the making of an order upon review have been established.

5.247 This recommendation, as well as our previous recommendation respecting consensual arbitrators, is subject to two provisos. Our proposed rules of *locus standi* were based largely upon our view that the public interest in administrative legality required recognition. This consideration cannot be given the same weight in relation to the decisions of private decision-makers who are generally not exercising powers in the public interest. Proceedings should be instituted only by the person directly affected by the domestic tribunal's ruling. Accordingly, we recommend:

RECOMMENDATION 49

That Recommendations 8 and 9 of this Report, which Recommendations pertain to standing or entitlement to make an application for an order upon review, not apply to the review of decisions made by a consensual arbitrator or other domestic tribunal.

RECOMMENDATION 50

That the Act provide that, in relation to the review of a decision of a consensual arbitrator or other domestic tribunal, an application for an order upon review may be brought only by a person who is directly affected by the decision.

5.248 Secondly, our recommendations relating to the standing of, intervention by, and notice to, the Attorney-General were based largely on his role as representative of the public interest in judicial review proceedings. We are of the view that no reason exists for granting to the Attorney-General special participatory rights in proceedings involving the decisions of domestic tribunals. Therefore, we recommend:

RECOMMENDATION 51

That provisions in the Act pursuant to Recommendations 34, 35, 36 and 37 respecting the Attorney-General not apply to the review of decisions made by a consensual arbitrator or other domestic tribunal.

5.249 Again, we wish to emphasize that we are not promoting a greater degree of control by the courts over the decisions of domestic tribunals. Our proposal would not create new jurisdiction where the court at present has none, although the inclusion of domestic tribunals under our proposed legislation would transform the 'cause of action' from breach of contract to unlawful exercise of power. This change in the theoretical underpinning of the court's jurisdiction, and in the method of procedure, need not affect the degree to which courts will monitor the activities of private organizations.

L. MECHANICS OF REFORM

5.250 In this section of our Report, we consider two remaining issues which pertain to the implementation of the recommendations in this Report. The first relates to the transitional rules which should be established for the legislation. On this issue, we recommend:

> *RECOMMENDATION 52*
>
> *That the Act apply to applications or actions commenced after the Act comes into force.*

The second issue pertains to the legislation implementing the recommendations set forth in this Report. In Chapter 7, we present a proposed Judicial Review Act with commentary by section. The complete text of the Act is included as Appendix A. Our final recommendation is:

> *RECOMMENDATION 53*
>
> *That the Legislature pass a statute to reform the law of judicial review of administrative action similar in substance to the proposed Judicial Review Act contained in this Report.*

M. THE IMPACT OF THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS*

5.251 In this final section of our Report, we briefly examine the impact of the *Canadian Charter of Rights and Freedoms* on judicial review of administrative action. In particular, we focus upon the major issues respecting the relationship between the *Charter* and our proposed Judicial Review Act. Because the *Charter* is still in its nascency - having come into force on April 17, 1982, with the section 15 "equality rights" not in force until April 17, 1985 - it is difficult as yet to draw any firm conclusions respecting its operation and effect. In what follows, we merely highlight several important issues, and suggest how they might be addressed in light of the judicial and academic pronouncements on the *Charter* thus far.

1. Scope

5.252 Section 32 of the *Charter* states:

> 32(1) This Charter applies
>
> (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament . . . ; and
>
> (b) to the *legislature* and *government* of each province in respect of all matters within the authority of the legislature of each province. [emphasis added]

In interpreting this provision, it is useful to keep in mind the basic principle that the general nature and purpose of a constitutional document is:

> . . . to establish the scope of governmental authority and to set out the terms of the relationship between the citizen and the state and those between the organs of government. The purpose of a Charter of Rights is to regulate the relationship of an individual with the government by invalidating laws and governmental activity which infringe the rights guaranteed by the document . . . .[223]

Although the language of the *Charter* is framed in terms of individual rights, the *Charter* takes effect by operating to restrict the powers of government.

5.253 What do the terms "legislature" and "government" comprise? Clearly, the *Charter* binds the Legislative Assembly of Manitoba in enacting laws for the province. Any statute enacted by the Legislature which is inconsistent with the *Charter* will be of no force or effect. As well, the reference to "legislature" serves to bind those persons and bodies exercising delegated statutory authority.

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[223] K. Swinton, "Application of the Canadian Charter of Rights and Freedoms" in *The Canadian Charter of Rights and Freedoms - Commentary* (W.S. Tarnopolsky and G.-A. Beaudoin eds. 1982) 44-45.

> Action taken under statutory authority is valid only if it is within the scope of that authority. Since neither Parliament nor a Legislature can itself pass a law in breach of the Charter, neither body can authorize action which would be in breach of the Charter. Thus, the limitations on statutory authority which are imposed by the Charter will flow down the chain of statutory authority and apply to regulations, by-laws, orders, decisions and all other action (whether legislative, administrative or judicial) which depends for its validity on statutory authority.[224]

5.254 The term "government" refers to the executive or administrative branch of government.[225] To the extent that the executive branch acts pursuant to statutory authority, there is substantial overlap between the bodies and activities to which the *Charter* applies by virtue of the reference to "legislature" and those bound by virtue of the reference to "government" in section 32(1). However, the executive may also act pursuant to common law powers, such as the Crown prerogative; the reference to "government" makes it clear that such action is also subject to the limitations imposed by the *Charter*.[226]

5.255 Thus far, the scope of the *Charter* appears delimited both by reference to institutional affiliation and by reference to the source of authority pursuant to which the person or body purports to act. Before examining in more detail the ambit of section 32(1), we wish to suggest that a third factor should be considered in determining the *Charter*'s application: whether the person or body is exercising a "governmental function".[227]

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[224] P.W. Hogg, *Constitutional Law of Canada* (2nd ed. 1985) 671.

[225] *Retail, Wholesale & Department Store Union, Local 580* v. *Dolphin Delivery Ltd*. (1986), 33 D.L.R. (4th) 174 (S.C.C.).

[226] *Retail, Wholesale & Department Store Union, Local 580* v. *Dolphin Delivery Ltd*., *ibid*. *See also Operation Dismantle Inc*. v. *The Queen*, *supra* n. 9.

[227] For a discussion of the governmental function test, *see e.g*., K. Swinton, *supra* n. 223.

Reliance upon the institutional criterion ("Is the body part of the governmental structure?") or the source-of-authority criterion ("Is the body acting pursuant to statutory authority?"), untempered by a functional criterion, may result in the *Charter*'s net being cast too widely.

5.256 It seems clear that the *Charter* generally applies to Cabinet, Ministers of the Crown, departmental officials, and government agencies and tribunals. It has also been held that municipalities and statutory self-governing professional associations are bound by the *Charter*.[228] These latter two types of entities, although not part of the provincial government in an institutional sense, are endowed by legislation with functions and powers governmental in nature.

5.257 On the other hand, it appears equally clear that the *Charter* does not apply *directly* to persons or bodies who are neither part of the executive branch of government nor exercising statutory authority in the interests of the public. Thus the *Charter* has been held inapplicable to the activities of private entities such as trade unions, sporting clubs and voluntary business associations.[229] However, because the government is bound by the *Charter*, a private individual or body cannot rely upon legislation or any other governmental act which contravenes the *Charter* when there arises a question involving the respective rights of private parties.[230]

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[228] *See e.g.*, *Re McCutcheon and City of Toronto* (1983), 147 D.L.R. (3d) 193 (Ont. H.C.); *Re Information Retailers Association of Metropolitan Toronto Inc. and Municipality of Metropolitan Toronto* (1985), 22 D.L.R. (4th) 161 (Ont. C.A.); *R.* v. *Bichel*, [1986] 5 W.W.R. 261 (B.C.C.A.) respecting municipalities. *See e.g.*, *Re Klein and Law Society of Upper Canada* (1985), 16 D.L.R. (4th) 489 (Ont. Div. Ct.); *Law Society of Manitoba* v. *Savino* (1983), 23 Man. R. (2d) 293 (Man. C.A.), leave to appeal to the Supreme Court of Canada granted November 21, 1983, respecting professional associations.

[229] *See e.g.*, *Re Wark and Green* (1984), 15 D.L.R. (4th) 577 (N.B.Q.B.) and *Re Bhindi and British Columbia Projectionists Local 348 of International Alliance of Picture Machine Operators of the United States and Canada* (1985), 20 D.L.R. (4th) 386 (B.C.S.C.) respecting trade unions; *Re Blainey and Ontario Hockey Association* (1986), 26 D.L.R. (4th) 728 (Ont. C.A.) respecting sporting clubs; *Peg-Win Real Estate Ltd.* v. *Winnipeg Real Estate Board*, *supra* n. 215 and *Chyz* v. *Appraisal Institute of Canada* (1984), 36 Sask. R. 266 (Q.B.), rev'd on other grounds (1985), 44 Sask. R. 165 (C.A.) respecting voluntary business associations.

5.258 Some problem areas do exist in establishing the parameters of "the legislature and government" within the meaning of section 32(1). Are "hybrid public/private" bodies such as universities and provincial hospitals bound by the *Charter*?[231] If so, are such bodies subject to the *Charter* only when acting in a public capacity (*quaere* precisely what that means) or does the *Charter* also govern their contractual relations with their employees?[232] In a similar vein, is the executive branch of government bound only when it acts *qua* government in a relationship with an individual *qua* citizen, or is it also bound, for example, when it acts *qua* employer in a relationship with an individual *qua* employee? What about Crown corporations engaged in activities primarily of a commercial nature?

5.259 It has been suggested that

> [t]he Charter . . . should not govern all acts of the Crown or its agents, but only those acts which are governmental in nature; acts of a private nature should be construed as such, which puts them outside the area of Charter applicability.[233]

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[230] *Retail, Wholesale & Department Store Union, Local 580* v. *Dolphin Delivery Ltd., supra* n. 225.

[231] *See e.g., Bancroft* v. *Governing Council of the University of Toronto* (1986), 53 O.R. (2d) 460 (H.C.); *Re Foothills Provincial General Hospital Board and United Nurses of Alberta, Local 115* (1985), 23 L.A.C. (3d) 42 (Alta. Arb. Bd.).

[232] The stronger view would appear to be that the employment policies and contracts of such bodies are not subject to *Charter* scrutiny: *Re Foothills Provincial General Hospital Board and United Nurses of Alberta, Local 115, ibid.*; *Harrison* v. *University of British Columbia* (1986), 30 D.L.R. (4th) 206 (B.C.S.C.); *Re McKinney and Board of Governors of the University of Guelph* (1986), 57 O.R. (2d) 1 (H.C.).

[233] *Re Foothills Provincial General Hospital Board and United Nurses of Alberta, Local 115, supra* n. 231, at 57.

However, no clear consensus has emerged on this issue.[234]

5.260 Questions respecting the scope of the *Charter* relate to judicial review of administrative action in two respects. First, in a general sense, both the *Charter* and judicial review force us to grapple with such difficult concepts as "governmental action" and "functions of a public nature". No doubt the case law spawned under the *Charter* will lead to a more refined analysis of these concepts. Such analysis will in turn influence future developments respecting the scope of judicial review in the administrative law field. With respect to our proposed Judicial Review Act in particular, we note that the institutional, functional and "delegated-authority" tests used to delimit the scope of the *Charter* resemble the criteria employed in our Report for identifying the proper scope of a superior court's supervisory jurisdiction (see Recommendation 4). This is not to suggest that the scope of the *Charter* and the scope of judicial review will necessarily coincide in all respects; however, it seems certain that there will be a substantial degree of overlap. In a more specific sense, exploring the scope of the *Charter* will identify the acts and decisions of administrative bodies which will be subject to judicial review under the proposed Act on the basis of breach of the *Charter*.

2. Grounds of Review

5.261 Any statute enacted by the Legislature which is inconsistent with the *Charter* will be of no force or effect. It follows that administrative action taken pursuant to such a statute would be without lawful authority, ie., *ultra vires*. Therefore, a decision of an administrative body may be challenged on the basis that its empowering statute contravenes the *Charter*.

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[234] *Compare Re Algonquin College and Ontario Public Service Employees' Union* (1985), 19 L.A.C. (3d) 81 (Ont. Arb. Bd.) *with Re Ontario Council of Regents for Colleges of Applied Arts & Technology (St. Lawrence College) and Ontario Public Service Employees Union (Blair)* (1986), 24 L.A.C. (3d) 144 (Ont. Arb. Bd.). *See also Re Hardie and District of Summerland* (1985), 24 D.L.R. (4th) 257 (B.C.S.C.) and *Headley* v. *The Public Service Commission Appeal Board*, F.C.A., January 26, 1987, where it appears to have been assumed that the *Charter* applies to governmental bodies and municipalities *qua* employers. For a discussion of these difficult issues, *see* D. Gibson, *The Law of the Charter: General Principles* (1986) 100-104, 109.

5.262 As well, activity which falls within the purview of the *Charter* will be *ultra vires* if the administrative body behaves in a manner which violates the *Charter*. Any act which contravenes the *Charter* - whether involving the passage of subordinate legislation, the exercise of regulatory functions or the making of an administrative decision or order - may be impugned on this basis. To illustrate how the *Charter* might be used to challenge administrative action, we will briefly examine two *Charter* provisions which have been a fruitful source of litigation in the administrative law setting.

(a) Fundamental freedoms

5.263 Section 2 of the *Charter* guarantees to everyone certain fundamental freedoms, including freedom of conscience and religion, and freedom of expression. The following cases exemplify the application of this section:

i) Judicial review proceedings were instituted by parents of school children in relation to a regulation which provided for opening or closing public schools each day with religious exercises. Both the validity of the regulation and the practice of the school board in holding these exercises were challenged as infringing freedom of religion.[235]

ii) The conduct of prison officials in restricting access to chaplains and religious services was (unsuccessfully) challenged by a group of remand inmates on the basis of violation of the applicants' rights to freedom of religion.[236]

iii) A rule of the Law Society of Upper Canada which restricted lawyers' contact with the news media and which was enforceable through the discipline process was declared to be of no force and effect as constituting a contravention of freedom of expression.[237]

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[235] *Re Zylberberg and Director of Education of Sudbury Board of Education* (1986), 55 O.R. (2d) 749 (Div. Ct.). The application was unsuccessful, *but see* the dissenting judgment of Reid J.

[236] *Re Maltby and Attorney-General of Saskatchewan* (1982), 143 D.L.R. (3d) 649 (Sask. Q.B.). For a discussion of freedom of religion generally, *see* *Regina* v. *Big M Drug Mart Ltd.* (1985), 18 D.L.R. (4th) 321 (S.C.C.).

(b) Fundamental justice

5.264 Section 7 of the *Charter* provides:

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

This section has been interpreted as having both a procedural and a substantive component.[238] An administrative decision made in violation of the principles of fundamental justice in circumstances where section 7 applies will be *ultra vires*.

5.265 The application of section 7 to parole hearings and immigration proceedings is relatively clear, as liberty and security of the person are at issue in a very tangible sense.[239] Whether section 7 affords protection for commercial, economic and professional interests - a question of some significance in relation to professional associations and governmental regulatory agencies - has not yet been resolved; case law is divided on this issue.[240]

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[237] *Re Klein and Law Society of Upper Canada*, *supra* n. 228.

[238] *Reference re Section 94(2) of the Motor Vehicle Act* (1985), 24 D.L.R. (4th) 536 (S.C.C.).

[239] *See e.g.*, *Re Cadeddu and The Queen* (1982), 4 C.C.C. (3d) 97 (Ont. H.C.); *Re Singh and Minister of Employment and Immigration* (1985), 17 D.L.R. (4th) 422 (S.C.C.).

[240] *See e.g.*, *Re Gershman Produce Co. Ltd. and Motor Transport Board* (1985), 22 D.L.R. (4th) 520 (Man. C.A.); *Isabey* v. *Manitoba Health Services Commission*, *supra* n. 143; *Re Mia and Medical Services Commission of British Columbia* (1985), 17 D.L.R. (4th) 385 (B.C.S.C.); *Wilson* v. *The Medical Services Commission of British Columbia*, B.C.S.C., January 3, 1987, Lysyk, J.

5.266 The procedural requirements of fundamental justice generally reflect the requirements imposed by the principles of natural justice and procedural fairness at common law.[241] The precise procedures which must be followed in order to satisfy the principles of fundamental justice will vary from context to context.

5.267 Acting pursuant to legislation which contravenes the *Charter* and acting in a manner which violates the *Charter* are not expressly included as grounds of review under our proposed Judicial Review Act (see Recommendation 11). However, such unconstitutional activity by an administrative body is clearly captured in the ground which empowers the Court to intervene where a tribunal ". . . acted or proposed to act without or in excess of or in abuse of its authority . . . ." We note parenthetically that, in light of judicial pronouncements respecting the scope of the *Charter* thus far, it appears that decisions of domestic tribunals (which were included within the ambit of the proposed Act largely for reasons of procedural convenience) would not generally be subject to challenge on *Charter* grounds.

3. Remedies and Procedure

5.268 Section 24(1) of the *Charter* states as follows:

> 24(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

The section does not prescribe the procedure to be followed when seeking a remedy for infringement of *Charter* rights; the existing procedures associated with the particular form of relief sought are to be utilized and adapted.

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[241] *See* the discussion of fundamental justice in *Re Singh and Minister of Employment and Immigration*, *supra* n. 239.

5.269 Where an administrative act or decision is being challenged on *Charter* grounds, the procedures normally used for seeking judicial review are followed. In both Ontario and British Columbia, as well as in the Federal Court of Canada, judicial review legislation is employed when administrative action is impugned on the basis that the legislation pursuant to which the body exercised its powers contravenes the *Charter* or that the administrative body acted in a manner contrary to the *Charter*.[242] Similarly, proceedings under the proposed Judicial Review Act will be available where administrative acts and decisions are subject to *Charter* challenge.[243]

5.270 Section 24(1) appears to contain its own rule of *locus standi*: relief may be sought by "[a]nyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied . . . ." It is apparent that this standing provision is narrower than the two-tiered formulation which we recommended be adopted in the proposed Act (see Recommendation 9). Where an application for judicial review is brought under the proposed Act on the basis of a *Charter* violation, which standing provision will prevail?

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[242] *See e.g.*, *Re Koumoudouros and Municipality of Metropolitan Toronto* (1982), 136 D.L.R. (3d) 373 (Ont. H.C.); *Re Hussey and Attorney-General for Ontario* (1984), 9 D.L.R. (4th) 696 (Ont. Div. Ct.); *Cromer* v. *British Columbia Teachers' Federation* (1986), 4 B.C.L.R. (2d) 273 (C.A.); *Re Singh and Minister of Employment and Immigration*, *supra* n. 239.

[243] Note, however, that where a *direct* challenge to the constitutional validity of *primary* legislation is instituted, whether on the basis of distribution of powers or the *Charter*, proceedings under the proposed Act would be inappropriate. The proposed Act operates only where administrative acts or decisions (whether quasi-judicial, administrative or legislative in nature) are being challenged. *Cf. Re Service Employees International Union, Local 204 and Broadway Manor Nursing Home* (1984), 13 D.L.R. (4th) 220 (Ont. C.A.) for the comparable situation under Ontario's *Judicial Review Procedure Act*.

5.271 We are of the view that, in such circumstances, the broader standing rules in the Act should govern. Earlier drafts of section 24(1) indicate that its original purpose was simply to provide for a remedy where no other appropriate remedy was available.[244] It would be startling if that same section were now to be used to restrict access to the courts. As well, where *direct* challenges to the constitutional validity of primary legislation have been undertaken pursuant to the *Charter*, section 24(1) has not operated to limit the rules of *locus standi* which ordinarily pertain to challenges of a constitutional nature.[245]

5.272 Professor Hogg has made the following observation:

> . . . the standing requirements of s. 24(1) are stricter than those of many other remedies which are available for unconstitutional action. However, since s. 24(1) is not the exclusive remedy for a Charter infringement, if one of the other remedies is available, it can be resorted to where s. 24(1)'s strict standing requirements cannot be fulfilled.[246]

We are of the view, therefore, that section 24(1) should be read as facilitative, rather than restrictive; an applicant need only meet the standing requirements under the proposed Act in order to challenge administrative activity on the basis of a *Charter* violation.

5.273 As is revealed by our brief overview of the *Charter*, the precise impact of the *Charter* on administrative law in general, and judicial review in particular, awaits clarification. Nevertheless, our recommendations have been formulated with the *Charter* in mind, and we believe that our proposed Act will accommodate challenges to administrative activity based upon a breach of the *Charter*.

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[244] *See* D. Gibson, *supra* n. 234, at 193-195.

[245] *See* the discussion in T.A. Cromwell, *supra* n. 63, at 95-96 and 100-102; *Re Allman and Commissioner of the Northwest Territories* (1983), 144 D.L.R. (3d) 467 (N.W.T.S.C.).

[246] P.W. Hogg, *supra* n. 224, at 695.

CHAPTER 6

LIST OF RECOMMENDATIONS

The recommendations of the Commission in this Report are as follows:

1. That there be reform of judicial review of administrative action in Manitoba. (p. 85)

2. That the reform of judicial review of administrative action involve the restructuring of the traditional forms of relief into a new statutory remedy. (p. 86)

3. That the reform of judicial review of administrative action be accomplished by primary legislation. (p. 87)

4. That the scope of the proposed judicial review legislation ("the Act") generally extend to the review of any "decision of an administrative character" made (or purported, refused or proposed to be made) which, having regard to

   (a) the nature of the tribunal against which relief is sought;

   (b) the source of such tribunal's authority to make the decision;

   (c) the nature of the matter in respect of which review is sought; and

   (d) such other factors as the Court considers relevant;

   is properly the subject of the Court's supervisory jurisdiction. (pp. 89-90)

5. That the phrase "decision of an administrative character" in Recommendation 4 be defined broadly in the Act to include the doing of any act or thing, whether in the exercise of a discretion or not, and whether characterized as judicial, quasi-judicial, administrative, legislative or otherwise. (p. 90)

6. That the Act expressly exclude from its scope the review of matters arising in inferior court proceedings in relation to offences under provincial or municipal law. (p. 95)

7. That the Act expressly include within its scope the review, in appropriate circumstances, of inquiries or investigations and the making of reports or recommendations. (p. 96)

8. That the Act contain a uniform provision regarding standing or entitlement to apply for judicial review. (p. 100)

9. That this standing provision consist of a two-tiered formulation, namely:

    (a) standing as of right for those actually affected by the administrative action; and

    (b) standing at the discretion of the Court where, in the Court's view, it would be appropriate to allow the applicant to proceed on the basis of his interest as a member of the public. (p. 115)

10. That the common law grounds of judicial review provide the basis upon which relief is available under the proposed Act. (p. 126)

11. That the common law grounds of review under the Act be codified in general, comprehensive terms, such that the Court is empowered to intervene where the tribunal

    (a) failed to comply with a principle of natural justice or procedural fairness or a prescribed matter of procedure, where such compliance was required;

    (b) otherwise acted or proposed to act without or in excess of or in abuse of its authority, or unlawfully refused to exercise its authority;

    (c) committed an error of law in the course of exercising its authority, which is apparent on the face of the record, unless review on this basis is precluded by statute *[see Recommendation 13]* or otherwise by law;

    (d) made a decision induced or affected by fraud. (p. 129)

12. That the Act expressly define "record" to include any reasons given by the tribunal for its decision. (p. 130)

13. That the availability of review for error of law on the face of the record under the proposed Act be made subject to any restrictions imposed by privative clauses. (p. 133)

14. That privative clauses be utilized only where the Legislature deems it appropriate that the Court's power to review questions of law arising within the tribunal's area of authority and expertise be limited to situations where the tribunal's findings, interpretations or rulings were patently unreasonable. (p. 133)

15. That privative clauses in legislation be phrased to reflect their purpose and scope as outlined in Recommendation 14. (p. 133)

16. That the Court be empowered under the Act to make one or more of the following orders where grounds for review have been established in relation to a reviewable decision:

    (a) an order quashing or setting aside the decision or part of the decision (relief formerly available by certiorari);

(b) an order declaring the rights of the parties, the validity of the decision or other matters to which the decision relates (relief formerly available by declaration);

(c) an order compelling the doing of any act or the making of the decision according to law (relief formerly available by mandamus); or

(d) an order prohibiting the making of the decision, or prohibiting any act in preparation for, in furtherance of, or pursuant to the making of the decision (relief formerly available by prohibition or injunction). (p. 134)

17. That the Court be empowered under the Act to make an order referring the matter (or part of the matter) to which the application relates back to the tribunal for reconsideration and determination, subject to such directions as the Court considers proper. (p. 135)

18. That the Act expressly provide that, where any matter is referred back to the tribunal by the Court, the tribunal has the authority to reconsider and determine the matter in accordance with the Court's directions. (p. 135)

19. That the Court's discretion to refuse relief be preserved under the Act. (p. 137)

20. That the Court be empowered under the Act to grant such interim order as the Court considers proper, including

    (a) an order prohibiting or compelling the doing of any act in connection with a matter to which the application relates;

    (b) an order staying any proceedings before the tribunal; or

    (c) an order suspending the operation or effect of the tribunal's decision or of any act or order in furtherance of, or pursuant to, the tribunal's decision. (p. 139)

21. That the Court be empowered under the Act to declare the terms of an interim order against the Crown and those Crown officers immune from injunctive relief. (p. 144)

22. That the Court be empowered under the Act to award damages to an applicant where the applicant has included in his application for an order upon review a claim for damages arising from any matter to which the application relates and the Court is satisfied that the applicant would have been entitled to damages had he commenced an action therefor at the time of making his application. (p. 148)

23. That jurisdiction under the proposed Act be exercised by the Court of Queen's Bench for Manitoba. (p. 149)

24. That the Act contain no fixed limitation period for bringing an application for an order upon review. (p. 150)

25. That an application for an order upon review under the Act be commenced by originating notice of motion. (p. 152)

26. That, subject to Recommendations 27 and 28, the provisions in The Queen's Bench Rules governing originating notices of motion apply to an application for an order upon review. (p. 152)

27. That there be a provision in the Act stating that the contents of an application for an order upon review shall include notice of

    (a) the specific grounds upon which the applicant seeks relief;

    (b) the nature of the relief sought; and

    (c) the affidavits or other evidence intended to be used in support of the application. (p. 152)

28. That the Court be empowered under the Act to order the discovery of documents where it deems it appropriate to do so. (p. 152)

29. That the Act provide that the tribunal file in the Court

    (a) the record of the hearing, if any, in which the decision was made;

    (b) any exhibit, affidavit or other document filed during any such hearing before the tribunal;

    (c) the transcript, if any, of the oral evidence given during any such hearing before the tribunal;

    where a party to the application so requests, or where the Court, upon application or its own motion, so directs. (pp. 153-154)

30. That any application for an order of mandamus, prohibition, certiorari or declaration in relation to a decision to which the Act applies be treated as if it were an application for an order upon review. (p. 156)

31. That the Court, on application or its own motion, be empowered to direct that an action for a declaration or injunction, or both, whether with or without a claim for other relief, be continued as an application for an order upon review under the Act where the action is brought in relation to a decision to which the Act applies. (p. 156)

32. That the Court, on application or its own motion, be empowered to direct that an application for an order upon review under the Act be continued by action or otherwise where the application is brought in circumstances where the Act does not apply. (p. 156)

33. That where the Court directs the conversion of proceedings under Recommendation 31 or 32, it be empowered to give such further directions as it deems necessary to cause the proceedings to conform to the procedure by which they are to be continued. (p. 157)

34. That the Attorney-General have standing as of right to institute proceedings for an order upon review. (p. 169)

35. That the Attorney-General be entitled as of right to be heard on an application for an order upon review. (p. 169)

36. That, where the Attorney-General participates in an application for an order upon review pursuant to Recommendation 35, he be deemed to be a party to the proceedings, with all the rights, duties and liabilities of a party, unless the Court otherwise orders. (p. 170)

37. That the Act provide that notice of an application for an order upon review be served on the Attorney-General. (p. 172)

38. That the Court have the discretion to refuse to make an order upon review under the Act where it is satisfied that an alternative remedy, such as an appeal, would afford relief that is equally or more convenient, appropriate and effective in the circumstances of the case. (p. 176)

39. That the Act provide that, where any time limitation is fixed by or under any Act for the bringing of an application for an order upon review, the Court has the discretion to extend the time for bringing the application where it is satisfied that no substantial prejudice or hardship would result to any person affected by reason of the delay. (p. 177)

40. That the Court be empowered under the Act to:

    (a) allow an applicant to raise grounds in addition to those set forth in the application for an order upon review, on such terms, if any, as the Court considers proper; and

    (b) make an order upon review that is in substitution for or in addition to the relief sought by the applicant in the application for an order upon review. (p. 178)

41. That where the sole ground for relief established is a defect in form or a technical irregularity, the Act empower the Court to refuse relief, where it finds that no substantial wrong or miscarriage of justice has occurred, and, where a decision has already been made, to make an order validating the tribunal's decision. (p. 179)

42. That the remedy of quo warranto be abolished, and sections 96 to 98 of *The Queen's Bench Act*, which pertain to quo warranto, be repealed. (p. 181)

43. That the Act provide that where the remedy of quo warranto would have otherwise been available, the Court is empowered to grant relief in the nature of an order prohibiting the person from acting in the office and an order declaring the office to be vacant. (p. 181)

44. That the present requirement to post security for the commencement of quo warranto proceedings not be continued in the Act. (p. 181)

45. That the Act not apply where special provision is made in another statute for challenges to the entitlement of an official to act in a public office. (p. 181)

46. That the scope of the Act not extend to proceedings respecting an application for a writ of habeas corpus or an order of certiorari in aid thereof. (p. 182)

47. That the Act expressly include within its scope the review of decisions made by consensual arbitrators and consensual arbitration boards. (p. 188)

48. That the Court be empowered under the Act to review the decisions of a person or body functioning as a domestic tribunal, where grounds for the making of an order upon review have been established. (p. 195)

49. That Recommendations 8 and 9 of this Report, which Recommendations pertain to standing or entitlement to make an application for an order upon review, not apply to the review of decisions made by a consensual arbitrator or other domestic tribunal. (p. 196)

50. That the Act provide that, in relation to the review of a decision of a consensual arbitrator or other domestic tribunal, an application for an order upon review may be brought only by a person who is directly affected by the decision. (p. 196)

51. That provisions in the Act pursuant to Recommendations 34, 35, 36 and 37 respecting the Attorney-General not apply to the review of decisions made by a consensual arbitrator or other domestic tribunal. (p. 196)

52. That the Act apply to applications or actions commenced after the Act comes into force. (p. 197)

53. That the Legislature pass a statute to reform the law of judicial review of administrative action similar in substance to the proposed Judicial Review Act contained in this Report. (p. 197)

CHAPTER 7

THE JUDICIAL REVIEW ACT WITH COMMENTARY

7.01 In this Chapter, we present the proposed Judicial Review Act, in which the recommendations in this Report are reduced to statutory form. A brief explanatory note accompanies each section of the Act. The full text of the Act without commentary appears in Appendix A to this Report.

THE JUDICIAL REVIEW ACT

Her Majesty, by and with the advice and consent of the Legislative Assembly of Manitoba, enacts as follows:

Definitions.

1 In this Act

"Court" means Her Majesty's Court of Queen's Bench for Manitoba;

"domestic tribunal" includes

- *(i) a consensual arbitrator or board of arbitration; and*
- *(ii) a governing board or committee of a voluntary group or association exercising disciplinary authority over its members;*

"order upon review" means an order under subsection 7(2);

"record" includes any reasons given by the tribunal for its decision;

"tribunal" means a person, group of persons or body, whether or not incorporated and however described, which makes, or is empowered to make, a decision.

7.02 Section 1 sets forth the definitions of words and phrases contained in the proposed Act. The definition of "Court" implements Recommendation 23, in which we propose that the Court of Queen's Bench, which at present exercises inherent supervisory jurisdiction over the decisions of administrative authorities, be vested with jurisdiction respecting proceedings under the proposed Act. Pursuant to Recommendation 12, the common law definition of "record" is expanded to include any reasons given by the decision-maker, whether or not such reasons are incorporated by reference in the order or decision. The wording of the definition implies that only the reasons supporting the majority decision form part of the record. "Tribunal" is defined broadly to capture all types of administrative decision-makers, and would include committees, boards, commissions, tribunals, agencies and other bodies, as well as Ministers, governmental officials and other individual decision-makers.

Purposes of Act.

2 The major purposes of this Act are

(a) to provide a new framework within which the Court may exercise the supervisory jurisdiction traditionally exercised by way of the remedies of certiorari, prohibition, mandamus, injunction and declaration in relation to the acts and decisions of those persons and bodies exercising authority subject to the principles of administrative law, in a manner which eliminates the technical procedural and substantive distinctions governing the availability of the traditional forms of relief, but without affecting or constraining the determination and development of the scope and grounds of judicial review by the Court; and

(b) to facilitate judicial review by providing a simple procedure under which all forms of appropriate relief are available in one proceeding.

7.03 Section 2 sets out the major purposes of the proposed Act, and reflects the general reform policy outlined in §§5.02-5.06 of our Report. This section is included to emphasize that the principal objective of the Act is to effect reform of the procedures and remedies of judicial review. It is not intended to radically alter the substantive law or the scope of review, except to the extent of removing the technical distinctions among the traditional forms of relief. This statement of general purpose should facilitate the interpretation and application of the Act, particularly with respect to those provisions which delimit the Act's scope and the grounds of review.

Application of Act.

3(1) Subject to subsection (3), this Act applies to the review of a decision of an administrative character made, purported to be made, refused to be made, or proposed to be made, which, having regard to

(a) the nature of the tribunal against which relief is sought;

(b) the source of the tribunal's authority to make the decision;

(c) the nature of the matter in respect of which review is sought; and

(d) such other factors as the Court considers relevant;

is properly the subject of the Court's supervisory jurisdiction.

Decision of an administrative character.

3(2) A reference to the making of a decision of an administrative character in subsection (1) means the doing of any act or thing, whether of a judicial, quasi-judicial, administrative, executive, ministerial, or subordinate legislative character, and includes the holding of an inquiry or investigation and the making of a report or recommendation; and references to purporting to make, refusing to make and proposing to make a decision of an administrative character have corresponding meanings.

7.04 Subsections 3(1) and 3(2), which implement Recommendations 4, 5 and 7, operate to circumscribe the scope of the Act in relation to the activities of administrative authorities. For the reasons outlined in §§5.08-5.15 of the Report, we have adopted in subsection 3(1) a discretionary, rather than a determinate, formula to delineate the activities which are subject to review under the Act. The formula itself is without "hard" substantive content. In essence, it simply invites the court to consider the underlying factors which at present shape its supervisory jurisdiction at common law and to continue shaping that jurisdiction within the new framework which the Act provides.

7.05 When attempting to devise a scheme of judicial review without reference to the traditional forms of relief, it is necessary to provide some definition or formula for identifying reviewable matters.[1] At present, the scope of judicial review is implicit within each remedy itself: certiorari is appropriate to review certain types of decisions made by certain types of bodies; the declaration has its own set of rules governing the types of acts and bodies to which it applies in the "public law" realm. If a new remedy is created without reference to the old forms of relief, it has no implicit or natural boundaries. An express provision is required regarding the Act's scope.

7.06 The key phrase employed in the subsection 3(1) formula is "decision of an administrative character", which is expounded in subsection 3(2). This latter subsection gives a broad meaning to "decision", so as to include all types of action undertaken by administrative bodies in the exercise of their powers and duties. The doing of "any act or thing" is meant to embrace, for example, the making of an order, the issuing or revoking of a license and the passing of a regulation or by-law.

7.07 The specific inclusion of inquiries, investigations, reports and recommendations in subsection 3(2) implements Recommendation 7, and is used to clarify that "decision" includes determinations which do not have a final effect on a party's rights. Their inclusion follows those cases in Manitoba wherein it was held that such preliminary activity may be subject to judicial review (see §2.47).

7.08 Subsection 3(2) also makes it clear that the phrase "decision of an *administrative* character" [emphasis added] is employed in a broad sense to include acts and decisions which have been variously characterized as judicial, quasi-judicial, administrative, executive, ministerial or legislative, i.e., all the categories of acts and decisions within the administrative law realm which are reviewable, to a greater or lesser extent, at common law. The inclusion of "ministerial" (non-discretionary) decisions captures acts done in the discharge of a mandatory duty where no element of choice or discretion is involved.

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[1] *See e.g.*, Aust, s. 3(1) ("decision to which this Act applies"). However, the problem of expressly delineating the scope of judicial review legislation also arises, to a more limited extent, in schemes which create a new application for judicial review by incorporating the traditional forms of relief. This is so because of the public law/private law nature of the declaration and injunction. Even though the prerogative remedies are self-limiting, the awarding of injunctive and declaratory relief must somehow be confined to reviewable administrative law matters: *see e.g.*, Ont, s. 2(1) §2; BC, s. 2(2)(b); Eng Act, s. 31(2); Alta, r. 753.4(2); Sask, r. 664(2). *Cf.* NZ, s. 4(1).

7.09 At present, the court often determines the extent to which it will review a matter by classifying the function as quasi-judicial, administrative, etc. This method is "objectionable because it interposes an artificial and unnecessary system of classification between the question and answer sought."[2] Rather than invoking an amorphous label such as "executive" discretion to limit review, the court should squarely and openly address the factors which influence its decision and the underlying policy choices which it is making (see subsection 3(1) and the comments in §7.11). By making the various categories of decisions *potentially*[3] reviewable, irrespective of the labels which were formerly ascribed to them, it is hoped that subsection 3(2) will steer the court away from a label-pasting approach to judicial review.

7.10 The reference to making, purporting to make, refusing to make and proposing to make a decision in subsection 3(1) is intended to cover both the acts and omissions of administrative bodies, as well as activity contemplated for the future or as yet incomplete.

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[2] R.F. Reid and H. David, *Administrative Law and Practice* (2nd ed. 1978) 118.

[3] It is important to note that s. 3(2) is facilitative only; it does not render all acts and decisions subject to judicial scrutiny and control. To be reviewable, a decision of an administrative character must still pass the test of being "properly the subject of the Court's supervisory jurisdiction" under s. 3(1). As well, a decision can only be reviewed on the basis of the grounds of review in s. 7(1).

7.11 Subsection 3(1) then goes on to identify the three major discretionary factors which are to be considered in determining whether a particular decision is properly the subject of judicial review. The significance of, and interplay between, these three factors was discussed in §§5.09-5.13 of our Report. Although they are often hidden behind such questions as "Is this decision subject to review by certiorari?", we believe that these factors are implicitly used at present by the court in determining the scope of judicial review at common law. In most cases, the court will not be required to undertake an extensive analysis of these factors. If a matter was amenable to the prerogative remedies at common law, it clearly is a matter which is properly the subject of the court's supervisory jurisdiction. This is also true of matters in relation to which the declaration and injunction were available as supervisory remedies. A full and express analysis of the formula will only be required in novel or "borderline" cases. By providing the court with this flexible, discretionary formula, we expect that the ambit of the court's supervisory jurisdiction will continue to develop as it has at common law under the traditional forms of relief.

Review of offences excluded.

3(3) This Act does not apply to the review of matters arising in a proceeding before a judge, magistrate or justice of the peace in the Provincial Court of Manitoba instituted in relation to

(a) a matter of a criminal nature or any other matter which by law is not within the competence of the Legislature; or

(b) an offence arising under a provision of

i) an Act of the Legislative Assembly of Manitoba;
ii) a regulation, rule or order made under an Act; or
iii) a by-law of a municipality.

7.12 The provincial Legislature has no jurisdiction to regulate judicial review in proceedings involving criminal and other federal offences. Clause 3(3)(a), while not strictly necessary, is included to highlight that the review of such proceedings is not governed by the Act. Clause 3(3)(b) implements Recommendation 6, in which we propose that the Act not apply to the review of matters arising in inferior court proceedings in relation to offences under provincial or municipal law.

Domestic tribunals.

***4** This Act also applies to the review of a decision made, purported to be made, refused to be made or proposed to be made by a domestic tribunal, where, having regard to*

(a) the nature of the domestic tribunal against which relief is sought;

(b) the nature of the matter in respect of which relief is sought; and

(c) all the circumstances of the case;

the Court is of the view that it would be just and convenient for relief to be sought on an application for an order upon review.

7.13 Section 4 implements Recommendations 47 and 48, in which we conclude that decisions of consensual arbitrators and other domestic tribunals should be included within the scope of the proposed Act. (A non-exhaustive definition of "domestic tribunal" is provided in section 1.) Our reasons for so recommending are summarized in §§5.230-5.231 and §§5.244-5.246 of the Report. The decisions of most domestic tribunals (with the possible exception of consensual arbitrators) would not be encompassed by subsection 3(1) because such decisions are not generally subject to the inherent supervisory jurisdiction of the court. Accordingly, a separate section was required to incorporate the decisions of domestic tribunals within the Act. A discretionary formula is provided in section 4 under which the court can determine whether proceedings under the Act are appropriate.

Person affected has standing.

5(1) A person who is, or is likely to be, affected by a decision to which this Act applies may bring an application to the Court for an order upon review with respect to that decision.

Discretionary standing in public interest.

5(2) The Court may allow a person to bring an application for an order upon review with respect to a decision to which this Act applies, notwithstanding that the person does not meet the requirements of subsection (1), where the Court is of the view that it would be appropriate to allow the applicant to proceed on the basis of his interest as a member of the public.

Attorney-General may bring application.

5(3) The Attorney-General of Manitoba may bring an application to the Court for an order upon review with respect to a decision to which this Act applies.

7.14 Subsections 5(1), 5(2) and 5(3) set forth the provisions respecting standing to institute review proceedings under the Act in relation to the decisions of administrative authorities. They serve to implement Recommendations 8, 9 and 34.

7.15 Subsection 5(1) automatically confers standing upon those who are personally affected by the impugned administrative act or decision. The reference to a person who "is likely to be" affected serves to provide standing in cases where the decision has not yet been made or the decision-making process is as yet incomplete.

7.16 Subsection 5(2) acknowledges the interest of members of the general public in curbing illegal administrative activity, and imports the public interest standing test originally developed in the context of challenges to the constitutional validity of legislation (see §§2.83-2.87). It confers upon the court the discretion to permit a member of the public to institute review proceedings, even though the person's individual interests are not affected by the impugned act or decision. The factors which the court might consider in exercising its discretion are outlined in §5.72 of the Report.

7.17 Subsection 5(3) confirms the Attorney-General's entitlement to institute judicial review proceedings under the Act, which corresponds to the right he enjoys at present under the common law.

Exception for domestic tribunals.

5(4) This section does not apply to a decision made, purported to be made, refused to be made, or proposed to be made by a domestic tribunal.

Person directly affected by domestic tribunal has standing.

> *6 A person who is, or is likely to be, directly affected by a decision referred to in section 4 may bring an application to the Court for an order upon review with respect to that decision.*

7.18 Subsection 5(4) implements Recommendation 49 and part of Recommendation 51, and renders the standing criteria which apply in relation to administrative decisions inapplicable to decisions of domestic tribunals. Section 6 implements Recommendation 50, and provides a test for standing in relation to the decisions of domestic tribunals. By requiring that the applicant be "directly affected" by the decision, applications will generally be brought only by those persons who are themselves the subject of domestic disciplinary proceedings or, in the case of arbitrations, by one of the contracting parties. As is the case in subsection 5(1), the reference to a person who "is likely to be" directly affected in section 6 contemplates review proceedings respecting a decision-making process which is not yet complete.

Basis for order upon review.

> *7(1) The Court may make an order upon review where, with respect to a decision to which this Act applies, the tribunal*
>
> *(a) failed to comply with a principle of natural justice or procedural fairness or a prescribed matter of procedure, where such compliance was required;*
>
> *(b) otherwise acted or proposed to act without or in excess of or in abuse of its authority, or unlawfully refused to exercise its authority;*
>
> *(c) committed an error of law in the course of exercising its authority which is apparent on the face of the record, unless review on this basis is precluded by statute or otherwise by law;*
>
> *(d) made a decision induced or affected by fraud.*

7.19 Subsection 7(1) sets forth the grounds of review, and embodies Recommendations 10, 11 and 13. The listed grounds represent a general and comprehensive statement of the grounds of review at common law. Clause (a) deals with procedural requirements, whether imposed by common law or prescribed by the legislation pursuant to which the tribunal acts. The principle of natural justice known as the rule against bias would also be encompassed by clause (a).

7.20 Clause (b) comprises *ultra vires* activity or jurisdictional error other than errors of procedure which were addressed in clause (a). The specific grounds which would fall under clause (b) include: acting pursuant to legislation which is unconstitutional; improper appointment of tribunal members or lack of a quorum; error regarding matters preliminary or collateral to jurisdiction; making an unauthorized decision; refusing to perform a duty; wrongfully delegating authority; fettering of discretion; failing to exercise powers reasonably; bad faith or malice; exercising powers for improper purposes; taking into account irrelevant considerations; failing to take into account relevant considerations; exercising power in a manner inconsistent with the *Canadian Charter of Rights and Freedoms*; making a decision on the basis of no evidence; making an unreasonable finding of fact in the course of exercising authority; giving a statutory provision or contractual term a patently unreasonable interpretation in the course of exercising authority.

7.21 Clause (c) incorporates intra-jurisdictional error of law on the face of the record as a ground of review. Pursuant to Recommendation 13, the proviso at the end of clause (c) makes the availability of this ground subject to any privative clauses which prohibit review on this basis (review "precluded by statute"). This ground would also be unavailable where the court chooses to accord "curial deference" to the tribunal's interpretations of the law (review "precluded . . . otherwise by law"). In both these cases, review would be available respecting intra-jurisdictional questions of law only where the tribunal's interpretation was patently unreasonable, which would render the decision reviewable under clause (b) of this subsection.

7.22 Clause (d) permits a decision to be challenged where it was procured by fraud (such as perjured evidence) by a party or a witness acting in collusion with the party.

Nature of order upon review.

7(2) On an application for an order upon review, the Court, in its discretion, may refuse to grant relief or may make one or more of the following orders:

- *(a) an order quashing or setting aside the decision or part of the decision;*
- *(b) an order referring the matter or part of the matter to which the decision relates to the tribunal for reconsideration and determination, subject to such directions as the Court considers proper;*
- *(c) an order declaring the rights of the parties, the validity of the decision or other matters to which the decision relates;*
- *(d) an order compelling the doing of any act or the making of the decision according to law;*
- *(e) an order prohibiting the making of the decision, or prohibiting an act in preparation for, in furtherance of, or pursuant to the making of the decision;*

or such other order as the Court considers appropriate and just in the circumstances.

7.23 Subsection 7(2) sets forth the relief available on an application for judicial review under the Act. Pursuant to Recommendation 16, the court is empowered to make orders corresponding to the relief at present obtainable by way of certiorari (or motion to quash), declaration, mandamus, prohibition and injunction. In addition, the court is empowered to refer a matter back to the tribunal for reconsideration, as was proposed in Recommendation 17. The reference to "such other order as the Court considers appropriate and just in the circumstances" is included to ensure that the court is not constrained in awarding relief, particularly in circumstances where an administrative decision is found to be invalid on the basis of breach of the *Charter*.

7.24 Subsection 7(2) also empowers the court to exercise its discretion to refuse to grant relief. This implements Recommendations 19 and 38 in broad, general terms. The factors which the court might consider in refusing to award relief in an otherwise meritorious case were summarized in §5.120.

Authority of tribunal on a reference back.

7(3) Where any matter is referred back to the tribunal pursuant to an order under clause 7(2)(b), the tribunal shall have the authority to reconsider and determine the matter in accordance with the directions of the Court.

7.25 Subsection 7(3) implements Recommendation 18. This would meet any objection that the tribunal was *functus* or otherwise without authority to deal with the matter where the court makes a reference back under clause 7(2)(b).

Damages.

7(4) The Court may award damages to the applicant where

(a) the applicant has included in his application for an order upon review a claim for damages arising from any matter to which the application relates; and

(b) the Court is satisfied that, if the claim had been made in an action begun by the applicant at the time of bringing his application for an order upon review, the applicant would have been entitled to damages.

7.26 Pursuant to Recommendation 22, subsection 7(4) permits the court to award damages as ancillary relief on an application for judicial review. Note that the applicant may only seek damages where relief under subsection 7(2) is also sought. As was indicated in the body of our Report (§§5.144-5.148), we do not anticipate that it will often be appropriate for damages to be sought under the Act.

7.27 Subsection 7(4) does not alter the substantive law respecting the availability of damages for unlawful administrative activity; entitlement to damages under the Act is limited to those cases where damages would have been available in an action instituted therefor. As well, the ordinary limitation periods applicable to actions for damages would indirectly affect the awarding of damages under this subsection.

Procedure by originating notice.

8(1) An application for an order upon review shall be brought by way of originating notice.

7.28 Subsection 8(1) implements Recommendation 25, in which we propose that an order upon review be sought by the summary procedure which currently applies to the prerogative orders. Note that Q.B.R., r. 539(1) empowers the court to order the trial of issues raised in proceedings commenced by originating notice. Although procedural details are not included within the Act, The Queen's Bench Rules which govern originating notices of motion generally would apply. This is in conformity with Recommendation 26 which suggests that The Queen's Bench Rules should govern procedure except where otherwise provided in the Act.

Contents of application.

8(2) An application for an order upon review shall give notice of

(a) the specific grounds upon which the applicant seeks relief;

(b) the nature of the relief sought;

(c) the affidavits or other evidence intended to be used in support of the application; and

(d) any material the applicant wishes the tribunal to file in the Court.

7.29 Subsection 8(2) implements Recommendation 27. As well, clause (d) reflects the suggestion contained in §5.164 of the Report respecting notification to the tribunal of the materials the applicant wishes to have filed.

Order upon review not limited by contents of application.

8(3) Notwithstanding subsection (2), the Court may, in its discretion,

(a) allow the applicant to raise grounds in addition to the grounds relied upon in the application for an order upon review, on such terms, if any, as the Court considers proper; and

(b) make an order upon review that is in substitution for or in addition to the relief sought by the applicant in the application for an order upon review.

7.30 Subsection 8(3) implements Recommendation 40. Note that clause (b) refers only to the making of an additional "order upon review", i.e., an order under subsection 7(2). Thus, where the applicant did not include a claim for damages in his application, the court is not empowered under this subsection to award damages to the applicant; the requirement in subsection 7(4) that damages be specifically requested would prevail.

Filing of material.

9 Where a party to the application so requests, or where the Court, upon application or of its own motion so directs, the tribunal shall forthwith file in the Court

(a) the record of the hearing, if any, in which the decision was made;

(b) any affidavit, exhibit or other document filed during any such hearing before the tribunal;

(c) the transcript, if any, of the oral evidence given during any such hearing before the tribunal.

7.31 Section 9 implements Recommendation 29, and requires the tribunal to file only those materials which the applicant (or other party) requests to have filed. The tribunal is also required to file additional materials if the court so directs.

Interim order.

10(1) On an application for an order upon review, the Court may make such interim order as it considers proper, including, without limiting the generality of the foregoing,

(a) an order prohibiting or compelling the doing of any act in connection with a matter to which the application relates;

(b) an order staying any proceedings before the tribunal; or

(c) an order suspending the operation or effect of the tribunal's decision or of any act or order in furtherance of, or pursuant to, the tribunal's decision.

Interim order against Crown.

10(2) Where the Crown or an agent or servant of the Crown is a respondent to the application and interim relief is otherwise unavailable against the Crown, agent or servant, the Court may declare the terms of an interim order under subsection (1).

Terms of interim order.

10(3) An order under subsection (1) or (2) may be made subject to such terms and conditions as the Court thinks fit, and may be expressed to continue in force until the application for an order upon review is finally determined or until such other date, or the happening of such other event, as the Court may specify.

7.32 Section 10 implements Recommendations 20 and 21, and makes provision for the awarding of interim relief on applications for judicial review. Subsection 10(2) makes interim relief available against the Crown, but in a form which does not conflict with subsections 17(2) and 17(4) of *The Proceedings Against the Crown Act*, C.C.S.M. c. P140, which, *inter alia*, preclude injunctive relief against the Crown and its officers.

Production of documents.

11 The Court may make an order for the production and inspection of documents which are not privileged and which are in the possession or control of the tribunal or any other party.

7.33 The Queen's Bench Rules at present make no provision for discovery of documents in proceedings instituted by originating notice of motion. In accordance with Recommendation 28, the court is empowered under section 11 to make an order for the production and inspection of documents; however, the right to discovery is not automatic as it is for actions.

Defects in form, technical irregularities.

12 On an application for an order upon review, where the sole ground for relief established is a defect in form or a technical irregularity, if the Court finds that no substantial wrong or miscarriage of justice has occurred, the Court may refuse relief and, where the decision has already been made, may make an order validating the decision, notwithstanding such defect, to have effect from such time and on such terms as the Court considers proper.

7.34 Section 12 implements Recommendation 41.

Extension of time for bringing application.

13 Notwithstanding any limitation of time for the bringing of an application for an order upon review fixed by or under any Act, the Court may extend the time for bringing the application, either before or after expiration of the time so limited, where it is satisfied that no substantial prejudice or hardship will result to any person affected by reason of the delay.

7.35 Section 13 implements Recommendation 39.

Notice to Attorney-General.

14(1) Notice of an application for an order upon review shall be served on the Attorney-General of Manitoba.

Service on Attorney-General.

14(2) A notice under subsection (1) is sufficiently served on the Attorney-General of Manitoba if it is sent by registered or certified mail to, or during office hours it is left with, the Deputy Attorney-General of Manitoba, the Assistant Deputy Attorney-General of Manitoba (Justice Division) or the Director of Legal Services of the Department of the Attorney-General.

7.36 Section 14 sets forth those provisions which deal specifically with participation by the Attorney-General where proceedings are instituted by someone other than the Attorney-General. Subsection 14(1) implements Recommendation 37 and mandates service of notice on the Attorney-General. Subsection 14(2) specifies the manner in which service is to be effected.

Attorney-General may appear.

14(3) The Attorney-General of Manitoba is entitled as of right to appear in person or by counsel and to be heard on an application for an order upon review.

Status of Attorney-General.

14(4) Where the Attorney-General participates in an application for an order upon review pursuant to subsection (3), he shall, unless the Court otherwise orders, be deemed to be a party to the proceedings, with all the rights, duties and liabilities of a party.

7.37 Subsection 14(3) implements Recommendation 35 by conferring upon the Attorney-General the right to intervene in judicial review proceedings. Pursuant to subsection 14(4), upon intervention the Attorney-General will normally be deemed to be a full party to the proceedings, as proposed in Recommendation 36. However, where participation other than as a party (e.g. as *amicus curiae*) would be more appropriate, the court is empowered to confer a different status upon the Attorney-General.

Exception.

14(5) This section does not apply to an application for an order upon review with respect to a decision referred to in section 4.

7.38 Pursuant to Recommendation 51, the special provisions in section 14 respecting the Attorney-General are made inapplicable by subsection 14(5) to proceedings involving the decisions of domestic tribunals.

Order of mandamus, prohibition or certiorari.

15(1) Subject to section 17, no order of mandamus, prohibition or certiorari in relation to a decision to which this Act applies shall be issued, and any application for mandamus, prohibition or certiorari, or any common law motion to quash or set aside, in relation to such a decision shall be treated as if it were an application for an order upon review.

Declaration on originating notice.

15(2) Where an application for a declaration in relation to a decision to which this Act applies is brought by originating notice, such application shall be treated as if it were an application for an order upon review.

7.39 Subsections 15(1) and 15(2) implement Recommendation 30. In the event that an originating notice of motion for the prerogative remedies of mandamus, prohibition or certiorari, or, in relation to consensual arbitrations, a common law motion to quash, is commenced after the Act comes into force, and the application relates to a decision to which the Act applies, the matter is to be treated as an application for an order upon review under the Act, and relief is to be given in accordance with subsection 7(2). Subsection 15(2) provides for a similar result where an application for a declaration is brought under Q.B.R., r. 536 in relation to a decision to which the Act applies.

Conversion of procedure to application under Act.

16(1) Where an action for a declaration or injunction, or both, whether with or without a claim for other relief, is brought in relation to a decision to which this Act applies, the Court may, on application or its own motion, direct that the action be treated and disposed of as if it were an application for an order upon review.

Conversion of procedure to action.

16(2) Where an application for an order upon review is brought in circumstances to which the Act does not apply, the Court may, on application or its own motion, direct that the application be continued by action or otherwise.

Further directions.

16(3) Where the Court directs the conversion of procedure under subsection (1) or (2), it may give such further directions as are necessary to cause the proceedings to conform to the procedure by which they are to be continued.

7.40 Section 16 allows for the conversion of proceedings which have been improperly commenced. Subsection 16(1) implements Recommendation 31, while subsections 16(2) and 16(3) implement respectively Recommendations 32 and 33. This section provides a "safety valve" in the event an applicant makes a mistake in the choice of procedure.

Habeas corpus.

17 Nothing in this Act affects proceedings respecting an application for a writ of habeas corpus or for an order of certiorari in aid thereof.

7.41 By virtue of section 17, applications for *habeas corpus* remain unaffected by the Act, as was proposed in Recommendation 46.

Repeal.

18(1) Sections 96, 97 and 98 of The Queen's Bench Act are hereby repealed.

Quo warranto abolished.

18(2) Writs of quo warranto and informations in the nature of quo warranto are hereby abolished.

Order upon review in nature of quo warranto.

18(3) Where a person acts in an office in which he is not entitled to act and an information in the nature of quo warranto would, but for subsection (2), have been available against him, the Court may, on an application for an order upon review, grant an order prohibiting him from acting, an order declaring the office to be vacant or such other order as the Court considers proper.

Where other statutory provision.

18(4) Nothing in subsection (3) applies to or affects the proceedings in cases for which special provision is made by any other Act of the Legislature; but in all such cases the proceedings shall be instituted and taken in the manner provided by those Acts, and not otherwise.

7.42 Section 18 abolishes the remedy of quo warranto, and implements Recommendations 42, 43, 44 and 45. In lieu thereof, the Court is empowered under subsection 18(3) to grant an order similar in nature to an injunction and declaration. There is no requirement for an applicant to post security, as is at present required under subsection 96(2) of *The Queen's Bench Act*. Subsection 18(4) clarifies that the Act does not apply where special provision is made in another statute for challenging the entitlement of a person to hold a public office.

Binding on Crown.

19 The Crown is bound by this Act.

7.43 Section 19 is inserted in light of section 15 of *The Interpretation Act*, C.C.S.M. c. I80, which provides that no enactment is binding on Her Majesty or affects Her Majesty's prerogatives unless it is expressly stated therein that Her Majesty is bound thereby.

Transition.

20 This Act applies to proceedings which are commenced in the Court after the Act has come into force.

Commencement.

21 This Act comes into force on the day it receives the royal assent.

7.44 Section 20 sets forth the transition provision and implements Recommendation 52.

7.45 As was stated in the introductory Chapter of this Report, the proposed Act has been drafted with the present Queen's Bench Rules in mind. We are aware that significant changes to the Rules are being contemplated. In the event that new Rules are adopted, changes would have to be made to the procedural sections of the proposed Act in order to conform to the new Rules.

7.46 This is a Report pursuant to subsection 5(3) of *The Law Reform Commission Act*, signed this 31st day of March 1987.

Knox B. Foster

Knox B. Foster, Commissioner

Lee Gibson

Lee Gibson, Commissioner

John Irvine

John C. Irvine, Commissioner

Gerald O. Jewers, Commissioner

APPENDIX A

THE JUDICIAL REVIEW ACT

Her Majesty, by and with the advice and consent of the Legislative Assembly of Manitoba, enacts as follows:

Definitions.

1 In this Act

"Court" means Her Majesty's Court of Queen's Bench for Manitoba;

"domestic tribunal" includes

(i) a consensual arbitrator or board of arbitration; and

(ii) a governing board or committee of a voluntary group or association exercising disciplinary authority over its members;

"order upon review" means an order under subsection 7(2);

"record" includes any reasons given by the tribunal for its decision;

"tribunal" means a person, group of persons or body, whether or not incorporated and however described, which makes, or is empowered to make, a decision.

Purposes of Act.

2 The major purposes of this Act are

(a) to provide a new framework within which the Court may exercise the supervisory jurisdiction traditionally exercised by way of the remedies of certiorari, prohibition, mandamus, injunction and declaration in relation to the acts and decisions of those persons and bodies exercising authority subject to the principles of administrative law, in a manner which eliminates the technical procedural and substantive distinctions governing the availability of the traditional forms of relief, but without affecting or constraining the determination and development of the scope and grounds of judicial review by the Court; and

(b) to facilitate judicial review by providing a simple procedure under which all forms of appropriate relief are available in one proceeding.

Application of Act.

3(1) Subject to subsection (3), this Act applies to the review of a decision of an administrative character made, purported to be made, refused to be made, or proposed to be made, which, having regard to

(a) the nature of the tribunal against which relief is sought;

(b) the source of the tribunal's authority to make the decision;

(c) the nature of the matter in respect of which review is sought; and

(d) such other factors as the Court considers relevant;

is properly the subject of the Court's supervisory jurisdiction.

Decision of an administrative character.

3(2) A reference to the making of a decision of an administrative character in subsection (1) means the doing of any act or thing, whether of a judicial, quasi-judicial, administrative, executive, ministerial, or subordinate legislative character, and includes the holding of an inquiry or investigation and the making of a report or recommendation; and references to purporting to make, refusing to make and proposing to make a decision of an administrative character have corresponding meanings.

Review of offences excluded.

3(3) This Act does not apply to the review of matters arising in a proceeding before a judge, magistrate or justice of the peace in the Provincial Court of Manitoba instituted in relation to

(a) a matter of a criminal nature or any other matter which by law is not within the competence of the Legislature; or

(b) an offence arising under a provision of

i) an Act of the Legislative Assembly of Manitoba;
ii) a regulation, rule or order made under an Act; or
iii) a by-law of a municipality.

Domestic tribunals.

4 This Act also applies to the review of a decision made, purported to be made, refused to be made or proposed to be made by a domestic tribunal, where, having regard to

(a) the nature of the domestic tribunal against which relief is sought;

(b) the nature of the matter in respect of which relief is sought; and

(c) all the circumstances of the case;

the Court is of the view that it would be just and convenient for relief to be sought on an application for an order upon review.

Person affected has standing.

5(1) A person who is, or is likely to be, affected by a decision to which this Act applies may bring an application to the Court for an order upon review with respect to that decision.

Discretionary standing in public interest.

5(2) The Court may allow a person to bring an application for an order upon review with respect to a decision to which this Act applies, notwithstanding that the person does not meet the requirements of subsection (1), where the Court is of the view that it would be appropriate to allow the applicant to proceed on the basis of his interest as a member of the public.

Attorney-General may bring application.

5(3) The Attorney-General of Manitoba may bring an application to the Court for an order upon review with respect to a decision to which this Act applies.

Exception for domestic tribunals.

5(4) This section does not apply to a decision made, purported to be made, refused to be made, or proposed to be made by a domestic tribunal.

Person directly affected by domestic tribunal has standing.

6 A person who is, or is likely to be, directly affected by a decision referred to in section 4 may bring an application to the Court for an order upon review with respect to that decision.

Basis for order upon review.

7(1) The Court may make an order upon review where, with respect to a decision to which this Act applies, the tribunal

(a) failed to comply with a principle of natural justice or procedural fairness or a prescribed matter of procedure, where such compliance was required;

(b) otherwise acted or proposed to act without or in excess of or in abuse of its authority, or unlawfully refused to exercise its authority;

(c) committed an error of law in the course of exercising its authority which is apparent on the face of the record, unless review on this basis is precluded by statute or otherwise by law;

(d) made a decision induced or affected by fraud.

Nature of order upon review.

7(2) On an application for an order upon review, the Court, in its discretion, may refuse to grant relief or may make one or more of the following orders:

(a) an order quashing or setting aside the decision or part of the decision;

(b) an order referring the matter or part of the matter to which the decision relates to the tribunal for reconsideration and determination, subject to such directions as the Court considers proper;

(c) an order declaring the rights of the parties, the validity of the decision or other matters to which the decision relates;

(d) an order compelling the doing of any act or the making of the decision according to law;

(e) an order prohibiting the making of the decision, or prohibiting an act in preparation for, in furtherance of, or pursuant to the making of the decision;

or such other order as the Court considers appropriate and just in the circumstances.

Authority of tribunal on a reference back.

7(3) Where any matter is referred back to the tribunal pursuant to an order under clause 7(2)(b), the tribunal shall have the authority to reconsider and determine the matter in accordance with the directions of the Court.

Damages.

7(4) The Court may award damages to the applicant where

(a) the applicant has included in his application for an order upon review a claim for damages arising from any matter to which the application relates; and

(b) the Court is satisfied that, if the claim had been made in an action begun by the applicant at the time of bringing his application for an order upon review, the applicant would have been entitled to damages.

Procedure by originating notice.

8(1) An application for an order upon review shall be brought by way of originating notice.

Contents of application.

8(2) An application for an order upon review shall give notice of

(a) the specific grounds upon which the applicant seeks relief;

(b) the nature of the relief sought;

(c) the affidavits or other evidence intended to be used in support of the application; and

(d) any material the applicant wishes the tribunal to file in the Court.

Order upon review not limited by contents of application.

8(3) Notwithstanding subsection (2), the Court may, in its discretion,

(a) allow the applicant to raise grounds in addition to the grounds relied upon in the application for an order upon review, on such terms, if any, as the Court considers proper; and

(b) make an order upon review that is in substitution for or in addition to the relief sought by the applicant in the application for an order upon review.

Filing of material.

9 Where a party to the application so requests, or where the Court, upon application or of its own motion so directs, the tribunal shall forthwith file in the Court

(a) the record of the hearing, if any, in which the decision was made;

(b) any affidavit, exhibit or other document filed during any such hearing before the tribunal;

(c) the transcript, if any, of the oral evidence given during any such hearing before the tribunal.

Interim order.

10(1) On an application for an order upon review, the Court may make such interim order as it considers proper, including, without limiting the generality of the foregoing,

(a) an order prohibiting or compelling the doing of any act in connection with a matter to which the application relates;

(b) an order staying any proceedings before the tribunal; or

(c) an order suspending the operation or effect of the tribunal's decision or of any act or order in furtherance of, or pursuant to, the tribunal's decision.

Interim order against Crown.

10(2) Where the Crown or an agent or servant of the Crown is a respondent to the application and interim relief is otherwise unavailable against the Crown, agent or servant, the Court may declare the terms of an interim order under subsection (1).

Terms of interim order.

10(3) An order under subsection (1) or (2) may be made subject to such terms and conditions as the Court thinks fit, and may be expressed to continue in force until the application for an order upon review is finally determined or until such other date, or the happening of such other event, as the Court may specify.

Production of documents.

11 The Court may make an order for the production and inspection of documents which are not privileged and which are in the possession or control of the tribunal or any other party.

Defects in form, technical irregularities.

12 On an application for an order upon review, where the sole ground for relief established is a defect in form or a technical irregularity, if the Court finds that no substantial wrong or miscarriage of justice has occurred, the Court may refuse relief and, where the decision has already been made, may make an order validating the decision, notwithstanding such defect, to have effect from such time and on such terms as the Court considers proper.

Extension of time for bringing application.

13 Notwithstanding any limitation of time for the bringing of an application for an order upon review fixed by or under any Act, the Court may extend the time for bringing the application, either before or after expiration of the time so limited, where it is satisfied that no substantial prejudice or hardship will result to any person affected by reason of the delay.

Notice to Attorney-General.

14(1) Notice of an application for an order upon review shall be served on the Attorney-General of Manitoba.

Service on Attorney-General.

14(2) A notice under subsection (1) is sufficiently served on the Attorney-General of Manitoba if it is sent by registered or certified mail to, or during office hours it is left with, the Deputy Attorney-General of Manitoba, the Assistant Deputy Attorney-General of Manitoba (Justice Division) or the Director of Legal Services of the Department of the Attorney-General.

Attorney-General may appear.

14(3) The Attorney-General of Manitoba is entitled as of right to appear in person or by counsel and to be heard on an application for an order upon review.

Status of Attorney-General.

14(4) Where the Attorney-General participates in an application for an order upon review pursuant to subsection (3), he shall, unless the Court otherwise orders, be deemed to be a party to the proceedings, with all the rights, duties and liabilities of a party.

Exception.

14(5) This section does not apply to an application for an order upon review with respect to a decision referred to in section 4.

Order of mandamus, prohibition or certiorari.

15(1) Subject to section 17, no order of mandamus, prohibition or certiorari in relation to a decision to which this Act applies shall be issued, and any application for mandamus, prohibition or certiorari, or any common law motion to quash or set aside, in relation to such a decision shall be treated as if it were an application for an order upon review.

Declaration on originating notice.

15(2) Where an application for a declaration in relation to a decision to which this Act applies is brought by originating notice, such application shall be treated as if it were an application for an order upon review.

Conversion of procedure to application under Act.

16(1) Where an action for a declaration or injunction, or both, whether with or without a claim for other relief, is brought in relation to a decision to which this Act applies, the Court may, on application or its own motion, direct that the action be treated and disposed of as if it were an application for an order upon review.

Conversion of procedure to action.

16(2) Where an application for an order upon review is brought in circumstances to which the Act does not apply, the Court may, on application or its own motion, direct that the application be continued by action or otherwise.

Further directions.

16(3) Where the Court directs the conversion of procedure under subsection (1) or (2), it may give such further directions as are necessary to cause the proceedings to conform to the procedure by which they are to be continued.

***Habeas corpus*.**

17 Nothing in this Act affects proceedings respecting an application for a writ of *habeas corpus* or for an order of certiorari in aid thereof.

Repeal.

18(1) Sections 96, 97 and 98 of The Queen's Bench Act are hereby repealed.

Quo warranto abolished.

18(2) Writs of quo warranto and informations in the nature of quo warranto are hereby abolished.

Order upon review in nature of quo warranto.

18(3) Where a person acts in an office in which he is not entitled to act and an information in the nature of quo warranto would, but for subsection (2), have been available against him, the Court may, on an application for an order upon review, grant an order prohibiting him from acting, an order declaring the office to be vacant or such other order as the Court considers proper.

Where other statutory provision.

18(4) Nothing in subsection (3) applies to or affects the proceedings in cases for which special provision is made by any other Act of the Legislature; but in all such cases the proceedings shall be instituted and taken in the manner provided by those Acts, and not otherwise.

Binding on Crown.

19 The Crown is bound by this Act.

Transition.

20 This Act applies to proceedings which are commenced in the Court after the Act has come into force.

Commencement.

21 This Act comes into force on the day it receives the royal assent.

APPENDIX B

COMMENTATORS ON DRAFT REPORT

This is a list of persons and organizations who provided us with valuable comments on a preliminary draft of this Report which received limited circulation in January, 1986.

Administrative Law Sub-Section of The Manitoba Bar Association (Heather Leonoff)

Civil Rules & Procedures Committee of the Court of Queen's Bench for Manitoba

The Honourable Mr. Justice W.R. DeGraves, Court of Queen's Bench for Manitoba

The Honourable Mr. Justice Guy Kroft, Court of Queen's Bench for Manitoba

Labour Law Sub-Section of The Manitoba Bar Association

Law Reform Commission of Canada (John P. Frecker; Patrick Robardet)

Legal Services, The Department of the Attorney-General (Aaron L. Berg; Brian F. Squair, Q.C.)

David Matas, Winnipeg Lawyer

The Honourable Mr. Justice Alfred M. Monnin, Chief Justice of Manitoba, Court of Appeal of Manitoba

David J. Mullan, Professor of Law, Queen's University

William G. Ryall, Winnipeg Lawyer

The Honourable Mr. Justice Richard J. Scott, Associate Chief Justice, Court of Queen's Bench for Manitoba

Margaret A. Shone, Institute of Law Research and Reform (Alberta)